

The defendants in this case are a balloon manufacturer (Raven) and the subsidiary company it later created to conduct its balloon manufacturing business (Aerostar). Raven attempted to preserve its natural monopoly in the replacement fabric market by inserting language into its balloon manuals which required owners to use only Raven replacement fabric, to obtain Raven's written approval before replacing a significant amount of envelope fabric, and to avoid replacing more than 65% of the fabric under any circumstances. As Raven intended, balloon owners reasonably believed that FAA regulations required them to adhere to these restrictions, because balloon manuals do contain language that must be followed under federal law. Raven deliberately reinforced this false impression through its sales force and through its other publications. Aerostar continued the scheme when it took over Raven's balloon business.

Because the barrier to entry into the replacement fabric market is high, because Raven/Aerostar balloon owners believed they were permitted to replace only

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<sup>4</sup>(...continued)

sell the fabric. The licenses are type-specific; fabric which has qualified for use on an Aerostar balloon, for example, is not qualified for use on a Cameron balloon unless and until the fabric manufacturer obtains a PMA or an STC for the Cameron model.

limited portions of their envelopes, and because the owners were convinced that they were required to use Raven/Aerostar fabric to make these repairs, competition in the replacement fabric market was seriously restricted. Only two small companies obtained FAA approval to sell replacement fabric for Raven/Aerostar balloons. Raven and Aerostar reached an accommodation with one of them, and attempted to put the other out of business through a variety of methods.

Even the FAA was taken in by the Raven/Aerostar anticompetitive scheme. On the assumption that the restrictive language in the manuals really was legally binding on owners, the FAA prosecuted a balloon repair station which had used replacement fabric sold by one of the two-small competitors. Only after the administrative law judge pointed out that the manual language was not legally binding on owners did the FAA wake up. Once it had realized its mistake, the FAA required Aerostar to remove the language from its manuals.<sup>5</sup>

Harrison Aire, the plaintiff in this case, is a small corporation which has operated a balloon ride business since the 1970s. Its most profitable Aerostar balloon ultimately required either a new envelope or significant

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<sup>5</sup>This was the *Braden's* case referred to in the lower court opinions.

fabric replacement. Harrison Aire could not afford a new envelope, nor could it afford Aerostar's fabric, although it could have afforded one of the competitors'. Harrison Aire believed, on the basis of Aerostar's ICA language and on the basis of representations made to it by Aerostar's agents, that it was not permitted to use non-Aerostar fabric. Consequently it could not repair its balloon, and lost \$182,835 of income which would have been produced by that balloon over the 10-year useful life offered by a repaired envelope.

## ARGUMENT

### I

The circuit court created a new barrier to victims of anticompetitive activity in an aftermarket, by requiring the victim to show “hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market,” contrary to the express language of this Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*

The circuit court’s opinion acknowledges that Harrison Aire produced proof of anticompetitive conduct by Raven and Aerostar, and that this anticompetitive conduct caused antitrust injury.<sup>6</sup> The circuit court also found that the relevant market was the replacement fabric market for hot air balloons which were manufactured by Raven and its successor, Aerostar.<sup>7</sup> The circuit court recognized that, because of FAA requirements, Raven (and Aerostar) enjoyed a

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<sup>6</sup>Appendix A at 23a-25a, 423 F.3d at 385-386.

<sup>7</sup>Appendix A at 18a, 423 F.3d at 383 (“Under this framework, we believe the relevant market here is that for replacement fabric for Aerostar balloons”).

natural monopoly, in which only they were permitted to sell replacement fabric until, and unless, third party manufacturers could obtain FAA licenses to sell the fabric.<sup>8</sup>

The circuit court then departed from traditional antitrust analysis:

But *Kodak* does not transform every firm with a dominant share of the relevant aftermarket into a monopolist. To create a triable question of aftermarket monopoly power, the plaintiff must produce “hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market.” *SMS [Systems Maintenance Services, Inc. v. Digital Equipment Corp.]*, 188 F.3d[11] at 17 (1st Cir.1999).<sup>9</sup>

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<sup>8</sup>Appendix A at 4a, 423 F.3d at 378 (“The FAA authorizes third-party manufacturers to sell aftermarket parts, including replacement fabric, provided they first obtain FAA certification that the product is equal to or better than the original”).

<sup>9</sup>Appendix A at 17a, 423 F.3d at 383.

This was error. The requirement that an antitrust plaintiff must provide "hard evidence" showing that competition in the (replacement fabric) aftermarket, where Raven/Aerostar held a natural monopoly, is different from competition in the primary (hot air balloon) market, which was competitive, not only does not appear in *Kodak*, but was firmly rejected by this Court in that case. It is a requirement for which the First Circuit cited no authority in *SMS*, and which was not supported by any additional authority in the circuit court's opinion.

The First Circuit's opinion in *SMS* dealt with the unusual claim that a manufacturer's inclusion with its computers of a three-year warranty was anticompetitive. The First Circuit concluded that "[i]n the last analysis, SMS's monopoly power hypothesis defies common sense." 188 F.3d 26. Unfortunately, in reaching this conclusion the court of appeals added things to *Kodak* that are just not there.

The First Circuit began:

*Kodak*, then, stands for the proposition that the foremarket does not always exert sufficient competitive pressure to insulate the aftermarket from monopolistic practices. It does not hold, as SMS entreats, that the foremarket *never* exerts sufficient competitive pressure to keep the

aftermarket pristine. And the fact that the primary market at times may fail to discipline a derivative market does not mean that the latter necessarily constitutes the relevant market for antitrust analysis.

Although this was a restrictive reading of *Kodak*, it was literally true. However, the First Circuit continued:

Rather, a litigant who envisions the aftermarket as the relevant market must advance hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market. *Cf. id.* at 477, 112 S.Ct. 2072 (noting that the plaintiff adduced evidence that the defendants were able to--and did--charge supracompetitive prices in the aftermarket). Put another way, a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check. *See id.* at 481-82, 112 S.Ct. 2072; *see also* 10 Areeda & Hovenkamp, *supra*, ¶ 1740, at 170-71.

This was a proclamation of an unsupported conclusion. The “hard evidence” requirement simply does not appear in *Kodak*. The “*cf*” citations to the *Kodak* opinion lead nowhere; this Court said nothing of such an additional burden. Indeed, *Kodak* stands very much for the reverse proposition, that there is *no* additional burden.

One of *Kodak*’s principal holdings was that “there is no immutable physical law - no ‘basic economic reality’ - insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.”<sup>10</sup> It is not unreasonable to conclude that a competitive primary market will not preclude market power in the aftermarket. For a variety of reasons, consumers may simply choose not to base their equipment purchase decision on aftermarket costs.<sup>11</sup>

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<sup>10</sup>*Kodak*, at 504 U.S. at 471, 112 S.Ct. at 2084.

<sup>11</sup>“Moreover, even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive. If the costs of service are small relative to the equipment price, *or if consumers are more concerned about equipment capabilities than service costs*, they may not find it cost efficient to compile the information.” *Kodak*, at 504 U.S. at 474-  
(continued...)

Consequently, "it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine."<sup>12</sup> And once having purchased the equipment, an owner may be "locked in" to that purchase if the cost of switching is high.<sup>13</sup>

Thus, this Court explicitly rejected the notion that competition in the primary market forecloses market power in the aftermarket. Moreover, it placed the burden of proving such a link on the defendant. In the absence of such proof (and none exists in this case),

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<sup>11</sup>(...continued)

475, 112 S.Ct. at 2086. Emphasis added.

<sup>12</sup>*Kodak*, at 504 U.S. at 475-476, 112 S.Ct. at 2087.

<sup>13</sup>*Kodak*, at 504 U.S. at 476, 112 S.Ct. at 2087: "A second factor undermining Kodak's claim that supracompetitive prices in the service market lead to ruinous losses in equipment sales is the cost to current owners of switching to a different product.....If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands.

aftermarket antitrust issues are analyzed in exactly the same manner as are primary market antitrust issues. "Moreover, on the occasions when the Court has considered tying in derivative aftermarkets by manufacturers, it has not adopted any exception to the usual antitrust analysis, treating derivative aftermarkets as it has every other separate market."<sup>14</sup> In short, once the relevant market has been determined - primary market or aftermarket - the antitrust analysis is the same. Imposing additional burdens on a plaintiff, simply because the relevant market is an aftermarket, is contrary to this Court's holding in *Kodak*. It creates an unsupported, and unfair, distinction which penalizes victims of anticompetitive misconduct, based on nothing more than their misfortune to be producers or purchasers of a replacement part.

The circuit court sustained the district court's ruling strictly because of this additional burden: "Here, in contrast, Harrison Aire has failed to meet its burden of dissociating competition in the primary market from conditions in the aftermarket....Together, these

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<sup>14</sup>*Kodak*, at 504 U.S. at 479, footnote 29, 112 S.Ct. at 2089.

evidentiary failures compel summary judgment for the defendant.”<sup>15</sup>

The circuit court’s decision is not simply a misapplication of *Kodak*’s holding. It is a (perhaps unintentional) repudiation of that holding. Where this Court has held that there is no conceptual distinction between anticompetitive conduct in a primary market, and anticompetitive conduct in an aftermarket, the circuit court has now held that there is a significant distinction, and that the victim of misconduct in the aftermarket is required to surmount a greater proof barrier than the victim of misconduct in the primary market.

This Court has already specifically disapproved such a distinction, and should disapprove it here. Competition rights are already expensive to enforce. Requiring a plaintiff to produce proof of the competitive states of two markets, without some rational justification, only makes a heavy burden heavier.

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<sup>15</sup>Appendix A at 19a, 423 F.3d at 384.

## II

The circuit court's refusal to allow Plaintiff favorable inferences on a summary judgment motion introduced a special burden on plaintiffs facing summary judgment in antitrust cases, contrary to the express direction of this Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*

This case was decided on a summary judgment motion. Both sides had submitted extensive evidence in support of, and in opposition to, that motion.<sup>16</sup> The circuit court held that “[s]ignificantly, however, ‘antitrust law limits the range of permissible inferences’ that can be drawn ‘from ambiguous evidence.’.....To avoid deterring pro-competitive behavior, ‘certain inferences may not be drawn from circumstantial evidence in an antitrust case.’”<sup>17</sup> The circuit court then viewed much of the evidence in a light more favorable to the defendants than to the plaintiff. This was contrary to this Court's holding in *Kodak*, which reaffirmed that traditional Rule 56 standards apply to antitrust cases.

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<sup>16</sup>The appendix in the Third Circuit was composed of four volumes.

<sup>17</sup>Appendix A at 9a, 423 F.3d at 380.

The language quoted by the circuit court is drawn from *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). This Court, in *Kodak*, expressly limited *Matsushita's* language:

The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense ***did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases.*** The Court did not hold that if the moving party enunciātes *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.<sup>18</sup>

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<sup>18</sup>504 U.S. at 468-469, 112 S.Ct. at 2083. Emphasis added.

This simply restated traditional Rule 56 summary judgment standards. The Court observed: “*Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable.*”<sup>19</sup>

The circuit court therefore ignored the appropriate standard in reviewing Defendants’ motion for summary judgment. Consequently the circuit court refused to draw the permissible inference that the high prices of Raven/Aerostar replacement fabric supported an inference of market power.<sup>20</sup> Indeed, the circuit court weighed the evidence before it, and drew the

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<sup>19</sup>504 U.S. at 469, 112 S.Ct. at 2083. Emphasis added.

<sup>20</sup>“Harrison Aire contends Aerostar charged supracompetitive prices for its fabric, based on the uncontested fact that Aerostar’s fabric is more expensive than that of its aftermarket competitors. But this alone does not support a reasonable inference of monopoly power. Competitive markets are characterized by both price and quality competition, and a firm’s comparatively high price *may* simply reflect a superior product.” Appendix A at 11a, 423 F.3d at 381. Emphasis added.

opposite inference, that the undisputed high price of Raven/Aerostar fabric was due to its higher quality.<sup>21</sup> This was error. Harrison Aire was entitled to the inference that the high price of Raven/Aerostar fabric at

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<sup>21</sup>Appendix A at 12a, 423 F.3d at 381:

Here, the record is clear that balloon fabric is a heterogeneous product. Fabric is sold in various weaves and grades, of differing strength and durability. The record demonstrates that Aerostar fabric is of comparatively high quality. Although Harrison considered purchasing fabric from one of Aerostar's aftermarket competitors, Custom Nine Designs, he rejected the product because Custom Nine "didn't prove to me that it wasn't a bogus part." Furthermore, Custom Nine's president acknowledged that Aerostar's "diamond weave" fabric was a superior aftermarket product to his own. Because it is undisputed that balloon fabric, and particularly Aerostar fabric, is differentiated by composition and quality, Aerostar's comparatively high price does not, by itself, support a reasonable inference of monopoly power.

least was an indicator of market power. It was for the jury, not for a panel of appellate judges, to resolve the issue.

As with the previously-discussed aftermarket burden issue, the circuit court has created a hurdle for victims of anticompetitive misconduct that this Court has expressly rejected. In the same manner that this Court put an end to circuit court creation of "heightened pleading standards" in §1983 civil rights cases, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), it should act now to prevent similar judicial creation of heightened summary judgment requirements in antitrust cases.

## CONCLUSION

The circuit court's decision creates a requirement that a victim of anticompetitive activity in an aftermarket must affirmatively show, "by hard evidence," that the competitive state of the aftermarket is not the same as the competitive state of the primary market. This Court has expressly rejected such an expensive and irrational requirement. Certiorari should be granted to prevent the hardship which will result, in this case and in future cases, from the promulgation of

such a doctrine, in violation of this Court's specific direction.

The circuit court also refused to apply traditional Rule 56 summary judgment principles to antitrust matters. Again, this is against the express direction of this Court. Certiorari should be granted to end this practice of according more favorable treatment to antitrust defendants than to defendants in all other cases.

Respectfully submitted,

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## **APPENDICES**

**APPENDIX A**

**PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

Nos. 04-2904 & 04-3052

HARRISON AIRE, INC.,  
Appellant in No. 04-2904

v.

AEROSTAR INTERNATIONAL, INC.;  
RAVEN INDUSTRIES, INC.,  
Appellants in No. 04-3052

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
D.C. Civil Action No. 02-cv-01258  
(Honorable Michael M. Baylson)  
Argued March 7, 2005

Before: SCIRICA, *Chief Judge*,  
ROTH and BECKER, *Circuit Judges*

(Filed September 16, 2005)

## OPINION OF THE COURT

SCIRICA, *Chief Judge*.

In this antitrust action, we address allegations of unlawful monopolization and tying in the aftermarket for replacement hot air balloon fabric. The District Court granted defendants' motion for summary judgment, finding no triable issue of monopoly power in the relevant product market. We will affirm.

### I.

Harrison Aire, a hot air balloon ride operator, alleges antitrust violations by Raven Industries and its balloonmanufacturing subsidiary, Aerostar International. Consistent with our standard of review on summary judgment, we recount the facts in the light most favorable to the non-moving party, appellant Harrison Aire.

Terry Harrison, the sole owner and proprietor of Harrison Aire, is an FAA-licensed pilot and aircraft mechanic. After a twenty-three year career at Eastern Airlines, he retired in 1973 to launch the Harrison Aire enterprise from an airstrip in central New Jersey. The company owns and operates several hot air balloons

which it charters for recreational day trips over the New Jersey countryside. Since the mid 1990s, the business has suffered cash-flow problems. Harrison Aire blames its losses, in part, on the prohibitive expense of replacement balloon fabric, which it contends is a result of Raven/Aerostar's monopolization of the relevant balloon fabric aftermarket.

Raven Industries is a diversified manufacturing company based in Sioux Falls, South Dakota. From the 1970s through 1986, it manufactured hot air balloons and replacement balloon fabric. In 1986, Raven formed Aerostar International as a wholly-owned subsidiary to take over its balloon business. Aerostar International manufactures and sells hot air balloons in a market of at least five competitors and also produces and sells replacement balloon fabric.

Hot air balloons are regulated from cradle to grave by the Federal Aviation Administration. The FAA certifies balloon design and manufacturing standards, 14 C.F.R. § 21.11-53, requires the manufacturer to provide a maintenance manual along with its aircraft, *id.* § 21.50, reviews the content of the manual, *id.* § 31.82, and certifies replacement part designs for airworthiness, *id.* 21.303. The FAA's "maintenance manual" and "replacement part" regulations bear on this appeal.

Balloon manufacturers are required to provide their customers with a balloon maintenance manual, known as an "ICA" (Instructions for Continued Airworthiness), which sets forth recommended and required maintenance procedures. The manual is in two parts. The first, known as the "FAA accepted" section, establishes manufacturer-recommended but not FAA-required protocols. The second, known as the "Airworthiness Limitation Section," establishes FAA requirements affecting flight safety.

Regulations also govern the manufacture and sale of replacement balloon parts, including replacement fabric. All replacement parts must be "of such a quality" that the repaired balloon is "at least equal to its original or properly altered condition." 14 C.F.R. § 43.13(b). The FAA authorizes third party manufacturers to sell aftermarket parts, including replacement fabric, provided they first obtain FAA certification that the product is equal to or better than the original. *Id.* § 21.303.

Replacement fabric extends the service life of a hot air balloon. The top half of the balloon "envelope"—the material encapsulating the hot air—tends to deteriorate more rapidly than the bottom half. By replacing top-half fabric after 300 to 500 hours of use, balloon owners are able to extend the aircraft's service life for

an additional 200 to 300 hours. Generally, it is more economical to replace fabric in this manner than to purchase an entirely new envelope. Harrison Aire followed this practice in maintaining its fleet of Raven/Aerostar balloons.

Harrison Aire purchased its first Raven balloon in 1978. The parties' dispute over fabric replacement began shortly thereafter. According to Terry Harrison, Raven advised him that he could not purchase replacement fabric from other manufacturers because installation of third-party fabric would render the balloon unairworthy. In 1982, Raven revised its balloon maintenance manuals to make this policy explicit, warning Raven balloon owners that "only fabric which has been tested and approved according to Raven factory standards may be used for repair of Raven envelopes. Failure to comply with this requirement constitutes a departure from type design and renders the balloon unairworthy." This language appeared in the FAA-approved, rather than the FAA-required, section of Raven maintenance manuals. Reading the manual in the light most favorable to Harrison Aire, it warned that only Raven-brand fabric should be used in Raven balloons.

Terry Harrison repeatedly complained to Raven, believing its insertion of the "warning" into the balloon manual transformed the fabric policy into an FAA

requirement that legally barred him from obtaining cheaper fabric elsewhere. On several occasions between 1982 and 1986, Harrison confronted Raven representatives about the manual language, but was told that no other aftermarket product was equal to or better than Raven fabric, and that only Raven fabric was consistent with airworthiness standards. Harrison understood this as a representation that he was required to purchase Raven fabric in order to comply with the FAA's "equal to or better" standard for replacement parts. Harrison Aire contends that from 1978 to 1986, Raven misled the company into believing the purchase of Raven fabric was mandated by law, when in fact it was merely recommended by the manufacturer.

In February 1986, Raven Industries formed Aerostar International to take over its hot air balloon business. Aerostar continued Raven's balloon operation essentially uninterrupted, and became the new focus of Harrison Aire's campaign to purchase fabric from third-party sources. Shortly after Aerostar was incorporated, Harrison registered several complaints with Aerostar about "being forced" to use Raven/Aerostar fabric. Nevertheless, despite its understanding that Aerostar balloons required Aerostar replacement fabric, Harrison Aire purchased a "big ride" Aerostar balloon in 1986 that is the subject of this litigation.

By 1995, Harrison Aire's "big ride" Aerostar balloon required a major fabric replacement. By this time, two other manufacturers had received FAA approval to produce aftermarket fabric for Aerostar balloons. See 14 C.F.R. § 21.303 (authorizing the manufacture of replacement balloon parts upon receipt of a "Parts Manufacturer Approval" from the FAA). Harrison investigated one of the approved sellers, Custom Nine Designs, but decided against purchasing their fabric because of concerns that it lacked quality. Harrison never contacted the other approved supplier, Head Balloons. Viewing Aerostar-brand fabric as its only option and as prohibitively expensive, Harrison Aire retired the "big ride" balloon in 1996 rather than repairing it.

Harrison eventually realized that installation of thirdparty fabric was legally permissible. In July 2000, following an administrative proceeding between the FAA and a third-party balloon repair service, an Administrative Law Judge concluded the fabric "warning" found in Aerostar's maintenance manual was not legally binding. *In re Braden's Balloons Aloft, Inc.*, FAA No. CP99SWO037 (July 26, 2000). Harrison contends the *Braden's* decision provided him notice, for the first time, that his company was not required to purchase Aerostar-brand fabric.

In March 2002, Harrison Aire filed suit in federal court, alleging, *inter alia*, antitrust injury arising from Raven/Aerostar's monopolization of the aftermarket for replacement Aerostar balloon fabric and from the unlawful tying of Aerostar-brand fabric to Aerostar balloons. But for Raven/Aerostar's allegedly misleading and exclusionary aftermarket fabric policy, Harrison Aire contends that its "big ride" balloon would have been repaired in 1996 and still operational. The District Court granted summary judgment to defendants, holding they lacked sufficient market power in the relevant product market. *Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 316 F. Supp. 2d 186 (E.D. Pa. 2004).<sup>1</sup>

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<sup>1</sup>Harrison Aire's complaint included both federal antitrust counts and supplemental claims under state law. On May 3, 2004, the District Court granted Raven/Aerostar's motion for summary judgment in part, dismissing the antitrust counts and ordering trial on the state law counts. The parties then stipulated to final judgment with prejudice against Harrison Aire on the surviving claims, in order to facilitate an immediate appeal on the antitrust issues. Accordingly, the state law claims are not at issue and our analysis is confined to the federal antitrust claims.

## II.

The District Court had jurisdiction under the federal antitrust laws, 15 U.S.C. § 15 (providing cause of action and treble damage remedy), and 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Our summary judgment standard of review is plenary. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) (drawing all reasonable inferences in favor of the non-moving party).

Significantly, however, “antitrust law limits the range of permissible inferences” that can be drawn “from ambiguous evidence.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); see also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). To avoid deterring procompetitive behavior, “certain inferences may not be drawn from circumstantial evidence in an antitrust case.” *In re Flat Glass Antitrust Litig.*, 385 F.3d at 357 (quoting *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003)).

To survive a motion for summary judgment, an antitrust plaintiff must produce economically plausible evidence supporting the elements of its claim. See *Matsushita*, 475 U.S. at 588; *Ideal Dairy Farms v. John Labatt, Ltd.*, 90 F.3d 737, 748-50 (3d Cir. 1996) (applying

*Matsushita* in section 2 action); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1140 (E.D. Pa. 1981) (“It is now settled that summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce ‘significant probative evidence’ in support of the allegations in their complaint.”) (citations omitted). “If the plaintiff’s theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468-69 (1992).

### III.

We begin with Harrison Aire’s monopolization claim.

Under section 2 of the Sherman Act, monopolization consists of: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); see also 15 U.S.C. § 2; *LePage’s, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc) (reviewing section 2 case law and explaining the “willful acquisition or maintenance” element).

Monopoly power is defined as “the power to control prices or exclude competition.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). More precisely, it is “the power to charge a price higher than the competitive price without inducing so rapid and great an expansion of output from competing firms as to make the supracompetitive price untenable.” *Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319 (7th Cir. 1991); *see also United States v. Dentsply Int’l Inc.*, 399 F.3d 181, 189 (3d Cir. 2005) (emphasizing a monopolist’s power “to maintain market share”)(emphasis in original) (quoting *United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990)).

Monopoly power can be demonstrated with either direct evidence of supracompetitive pricing and high barriers to entry, *see Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9<sup>th</sup> Cir. 1995), or with structural evidence of a monopolized market. Because “direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power.” *United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (citations omitted).

#### A.

Harrison Aire contends Aerostar charged supracompetitive prices for its fabric, based on the

uncontested fact that Aerostar's fabric is more expensive than that of its aftermarket competitors. But this alone does not support a reasonable inference of monopoly power. Competitive markets are characterized by both price and quality competition, and a firm's comparatively high price may simply reflect a superior product. *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) ("Generally you must pay more for higher quality."). Therefore, "when dealing with a heterogeneous product or service . . . a reasonable finder of fact cannot infer monopoly power just from higher prices." *Id.* at 1411-12.

Here, the record is clear that balloon fabric is a heterogeneous product. Fabric is sold in various weaves and grades, of differing strength and durability. The record demonstrates that Aerostar fabric is of comparatively high quality. Although Harrison considered purchasing fabric from one of Aerostar's aftermarket competitors, Custom Nine Designs, he rejected the product because Custom Nine "didn't prove to me that it wasn't a bogus part." Furthermore, Custom Nine's president acknowledged that Aerostar's "diamond weave" fabric was a superior aftermarket product to his own. Because it is undisputed that balloon fabric, and particularly Aerostar fabric, is differentiated by composition and quality, Aerostar's

comparatively high price does not, by itself, support a reasonable inference of monopoly power.

## B.

Turning to Harrison Aire's circumstantial evidence of monopoly power, we note the structural indicators of a monopolized market. In a typical section 2 case, monopoly power is "inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers." *Microsoft*, 253 F.3d at 51; see also *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201-03 (3d Cir. 1992) (explaining market share analysis). Plaintiffs relying on market share as a proxy for monopoly power must plead and produce evidence of a relevant product market, of the alleged monopolist's dominant share of that market, and of high barriers to entry. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997) (market definition); *Fineman*, 980 F.2d at 201-03 (3d Cir. 1992) (market share); *Microsoft*, 253 F.3d at 82 (barriers to entry).

Additional factors are relevant in the aftermarket context. Aftermarket monopolization cases require a more comprehensive analysis, because market share data standing alone is not necessarily a reliable proxy for monopoly power. *SMS Syst. Maint. Servs. Inc. v.*

*Digital Equip. Corp.*, 188 F.3d 11, 16 (1st Cir. 1999). Many firms supply unique and/or proprietary aftermarket parts and services for their primary market products. As a result, they “can be expected to have a very high percentage” share of the relevant aftermarket. *Id.* But high aftermarket share is not necessarily indicative of monopoly power—i.e., the power to charge and maintain a supracompetitive price—because aftermarket behavior generally is disciplined by competition in the primary product market. If the primary market is competitive, a firm exploiting its aftermarket customers ordinarily is engaged in a short-run game—for when buyers evaluate the “lifecycle” cost of the product, the cost of the product over its full service life, they will shop elsewhere. Eventually, the aftermarket “monopolist” lacks customers to exploit. *See Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J., dissenting) (describing the exploitation of aftermarket customers as a “suicidal” business practice); *SMS*, 188 F.3d at 16 (“firms concerned with the long term cannot afford to bite the hands that feed them”).

This portrayal is conventional antitrust theory. *See* 2A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 564b, at 322-28 (2d ed. 2002). But as explained in *Kodak*, it “may not accurately explain the behavior of the primary and derivative markets for complex durable

goods” where “significant information and switching costs” sever the usual link between the primary market and the aftermarket. 504 U.S. at 473. Information costs are barriers that prevent primary market consumers from evaluating the lifecycle costs of a product. *Id.* at 473-74. For primary market competition to discipline aftermarket behavior, consumers require information on, among other things, the expected cost, quality and availability of aftermarket products such as parts and service. Perfect information is not required for the primary market to check the aftermarket. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984) (holding, in tying case, that imperfect information does not necessarily “generate the kind of monopoly power that justifies condemnation”); *SMS*, 188 F.3d at 19 n.3 (“perfect information about the aftermarket is not required”). But sometimes lifecycle pricing information is particularly difficult or impossible for primary market customers to acquire, as in the case of a unilateral change in aftermarket policy targeting “locked in” customers. *Kodak* involved this type of market failure. See *Queen City Pizza*, 124 F.3d at 440 (“The *Kodak* case arose out of concerns about unilateral changes in Kodak’s parts and repairs policies.”)

*Kodak* involved a primary market for photocopiers and an aftermarket for Kodak parts and service. The

primary market was competitive. But Kodak controlled nearly 100% of the parts aftermarket, and 80% to 95% of the service market. 504 U.S. at 480. Historically, Kodak's customers had been able to obtain copier repair service from independent service organizations that charged "substantially" less than Kodak. 504 15 U.S. at 457. Later, however, after customers were locked in to Kodak copiers, Kodak changed its aftermarket policy to sell replacement parts only to those customers who also purchased Kodak service or who repaired their own machines. *Id.* at 458. This policy change led to higher aftermarket prices. *Id.* at 465. In other words, Kodak used its power in the replacement parts market to "squeeze the independent service providers out of the repair market and to force copier purchasers to obtain service directly from Kodak, at higher cost." *Queen City Pizza*, 124 F.3d at 440.

The Supreme Court held the independent service organizations' tying and monopolization claims against Kodak could not be dismissed on summary judgment following truncated discovery. *Kodak*, 504 U.S. at 486. On the key question of monopoly power in the parts and services aftermarket, the Court cited evidence of (1) supracompetitive pricing, *id.* at 469; (2) Kodak's dominant share of the relevant aftermarket, *id.* at 480; (3) significant information costs that prevented lifecycle

pricing by primary market customers, *id.* at 475; and (4) high “switching costs” that served to “lock in” Kodak’s aftermarket customers, *id.* at 477. Together, this evidence supported a reasonable inference of monopoly power in the relevant aftermarket, precluding summary judgment.

In broad terms, *Kodak* stands for the proposition that market reality is the touchstone of antitrust analysis. Where the plaintiff comes forward with concrete evidence of a monopolized market, the defendant “bears a substantial burden in showing that it is entitled to summary judgment.” 504 U.S. at 469. On the more specific issue of aftermarket monopolization, *Kodak* held that primary market competition does not necessarily preclude monopoly power in the relevant aftermarket where a unilateral policy change targets “locked-in” customers.

But *Kodak* does not transform every firm with a dominant share of the relevant aftermarket into a monopolist. To create a triable question of aftermarket monopoly power, the plaintiff must produce “hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market.” *SMS*, 188 F.3d at 17 (1st Cir. 1999).

In considering the effect of primary market competition on aftermarket behavior, we address at the outset the relevant market definition. Some courts have viewed the primary and aftermarket as comprising a single relevant product market. *See id.*; *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997). But this may not always be the case. Relevant market definition is a function of reasonably available product substitutes. *Du Pont*, 351 U.S. at 395 (1956). Products are included in a single relevant market when they "have the ability—actual or potential—to take significant amounts of business away from each other." *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 206 (3d Cir. 1994) (quoting *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978)); *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986). Under this framework, we believe the relevant market here is that for replacement fabric for Aerostar balloons. The primary balloon market is distinct from the fabric aftermarket because fabric is a complement to, not a substitute for, the primary good. Nevertheless, these complementary products are linked by consumer demand such that competition in the foremarket may discipline behavior in the aftermarket. The proper inquiry, then, focuses on the existence of monopoly power, i.e., "whether competition in the equipment market will significantly

restrain power in the service and parts market.” *Kodak*, 504 U.S. at 470 n.15.

One important consideration is whether a unilateral change in aftermarket policy exploits locked-in customers. *Queen City Pizza*, 124 F.3d at 440 (3d Cir. 1997); *SMS*, 188 F.3d at 19 (1st Cir. 1999); *Alcatel USA, Inc. v. DGI Tech., Inc.*, 166 F.3d 772, 783 (5th Cir. 1999); *PSI*, 104 F.3d at 820 (6th Cir. 1997). As the Court of Appeals for the Seventh Circuit has explained: “The Court did not doubt in *Kodak* that if spare parts had been bundled with Kodak’s copiers from the outset, or Kodak had informed customers about its policies before they bought its machines, purchasers could have shopped around for competitive lifecycle prices. The material dispute that called for a trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines.” *Digital Equip. Corp. v. Uniq Digital Tech., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996); accord *SMS*, 188 F.3d at 17-19 (1st Cir. 1999); *PSI*, 104 F.3d at 820 (6th Cir. 1997).

We emphasize, however, that an “aftermarket policy change” is not the *sine qua non* of a *Kodak* claim. An aftermarket policy change is an important consideration, but only one of several relevant factors. As noted, the *Kodak* plaintiffs came forward with evidence of (1)

supracompetitive pricing, (2) Kodak's dominant share of the relevant aftermarket, (3) significant information costs that prevented lifecycle pricing, and (4) high "switching costs" that served to "lock in" Kodak's aftermarket customers.

Here, in contrast, Harrison Aire has failed to meet its burden of dissociating competition in the primary market from conditions in the aftermarket. It is undisputed that the primary balloon market is competitive. And unlike the plaintiffs in *Kodak*, Harrison Aire has failed to produce evidence of supracompetitive pricing, of dominant aftermarket share, of information costs preventing lifecycle pricing, or of a change in aftermarket policy targeting locked-in customers. Together, these evidentiary failures compel summary judgment for the defendant.

Harrison Aire purchased its first Raven balloon in 1978. From that time on, Terry Harrison believed that Raven required him to use Raven-brand replacement fabric. Harrison repeatedly complained about this policy. From 1982, when Raven first published its allegedly exclusionary "warning" about third-party replacement fabric, and continuing through 1986, when Raven formed Aerostar, Terry Harrison on several occasions confronted Raven representatives about their restrictive fabric policy. Similarly, immediately after Aerostar's

incorporation in February, 1986, Harrison registered several complaints about “being forced” to buy Aerostar fabric. Yet knowing Raven/Aerostar’s restrictive fabric policy, Harrison Aire entered the competitive primary market in 1986 to purchase the “big ride” Aerostar balloon that is the subject of this lawsuit.

The transparency of Raven/Aerostar’s aftermarket fabric policy, and Harrison Aire’s undisputed knowledge of it, cuts strongly against an inference of monopoly power. *SMS* is instructive on this point. Like Harrison Aire, the plaintiffs in *SMS* produced some evidence of switching costs, 188 F.3d at 20, but failed to come forward with sufficient evidence of supracompetitive pricing, *id.* at 24, and significant information barriers to lifecycle pricing, *id.* at 18-19, to survive summary judgment on the issue of monopoly power. In affirming summary judgment for the defendant, the court in *SMS* engaged in a comprehensive analysis under the relevant *Kodak* factors. In particular, *SMS* emphasized the transparency of the defendant’s aftermarket policy, explaining that readily available aftermarket information allows reasonably diligent primary market customers to engage in lifecycle pricing. *Id.* at 18-19. This, in turn, checks aftermarket monopolization. *See id.* at 19 (“[T]he transparency of [defendant’s] allegedly

monopolistic policy represents a salient departure from the *Kodak* scenario.”).

Raven/Aerostar’s aftermarket policy was transparent and known to Harrison Aire at all relevant times. Neither information costs nor a unilateral change in aftermarket policy prevented Harrison Aire from shopping for competitive lifecycle balloon prices when it purchased the “big ride” balloon at issue in 1986. Furthermore, after full discovery, Harrison Aire has not produced other evidence dissociating competitive conditions in the primary balloon market from conditions in the aftermarket for replacement fabric. The record here is clear that Harrison Aire got precisely the balloon and the aftermarket fabric that it bargained for in the competitive primary market.

Lacking any evidence of significant information barriers to lifecycle pricing, or any other evidence dissociating competitive conditions in the primary market and the aftermarket, summary judgment is proper on Harrison Aire’s monopolization claim.

#### IV.

Harrison Aire also alleges unlawful tying under section 1. The claim lacks merit. “Tying is defined as selling one good (the tying product) on the condition that the

buyer also purchase another, separate good (the tied product).” *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 475 (3d Cir. 1992) (en banc). “The antitrust concern over tying arrangements is limited to those situations in which the seller can exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not.” *Queen City Pizza*, 124 F.3d at 442-43 (quoting *Town Sound*, 959 F.2d at 475); see also *Microsoft*, 253 F.3d at 84. Tying requires “appreciable economic power” in the tying product market. *Kodak*, 504 U.S. at 464; *Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494, 516-17 (3d Cir. 1998).

Harrison Aire contends Raven/Aerostar unlawfully tied its hot air balloons (the tying product) to its replacement fabric (the tied product), but fails to produce any evidence of appreciable market power in the tying product market. As noted, it is undisputed that the primary market for hot air balloons is competitive. Absent this essential element, we will affirm summary judgment on the tying claim.

## V.

As an alternative holding, the District Court concluded Harrison Aire failed to properly allege antitrust injury

under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). This was error. *Brunswick* held the antitrust laws protect consumers, not competitors, and that antitrust plaintiffs must show a causal connection between the defendant's anticompetitive conduct and injury to consumers. *Id.* at 488-89.

Injury to competitors does not suffice. Here, Harrison Aire is a consumer of balloon fabric, and it claims antitrust injury in the form of business losses caused by high fabric prices, which in turn allegedly were caused by Raven/Aerostar's exclusionary conduct in the relevant fabric market. This type of injury—prohibitively high consumer prices resulting from allegedly monopolistic behavior—is the type the antitrust laws are designed to redress. *See Town Sound*, 959 F.2d at 486 (3d Cir. 1992) (en banc) (explaining antitrust injury); *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 626-28 (7th Cir. 2003) (same).

The District Court concluded that “[a]ny injuries that Plaintiff suffered would have come from Defendants’ misrepresentations, not from any market power, abuse of market power or other anticompetitive conduct.” 316 F.Supp.2d at 224. But these purported misrepresentations are alleged to have had an anticompetitive effect in the aftermarket—namely the exclusion of more efficient competitors. Harrison Aire

alleges that Aerostar used misleading manual language, and the imprimatur of FAA acceptance, to consolidate its position in the fabric aftermarket. This, in turn, allegedly prevented Harrison and consumers like him from purchasing lower-cost fabric from Aerostar's competitors. These allegations satisfy the antitrust injury requirement.

The District Court found antitrust injury lacking because the manual "did not forbid Plaintiff from purchasing other manufacturers' fabric and that a reasonable investigation on this point by Plaintiff would have disclosed . . . that Plaintiff could buy replacement fabric from anyone who manufactured [it] to the FAA standards." *Id.* at 217. In other words, the District Court held that no injury to consumers could be shown because no jury could find that Harrison Aire reasonably relied on the manual.

It is true that further investigation by Harrison Aire *might* have revealed that Aerostar's replacement-fabric instructions were not legally binding. But the record is not clear that Harrison Aire's reliance on the manual was unreasonable. Indeed, it appears that the FAA, like Harrison Aire, viewed Aerostar's manual as restricting the use of non-Aerostar fabric in Aerostar balloons. Not until the *Braden's* decision in 2000 did the FAA recognize the Aerostar manual as non-binding. Since

the FAA itself interpreted Aerostar's manual as restricting the use of third-party fabric, the reasonableness of Harrison Aire's reliance on that manual presents a jury question. A jury could have found that Harrison reasonably believed that Aerostar's manuals prevented him from buying lower-priced fabric from competitors. Because this alleged exclusion of competitors, to the detriment of consumers, is the sort of harm the antitrust laws are intended to prevent, summary judgment was improper on the issue of antitrust injury. While we hold Harrison Aire's antitrust claims ultimately fail for lack of monopoly/market power in the relevant market, they are not defective for failure to allege antitrust injury.

### **CONCLUSION**

For the reasons set forth, we will affirm the judgment of the District Court.

**APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

**HARRISON AIRE, INC.**

**V.**

**AEROSTAR INTERNATIONAL, INC. and  
RAVEN INDUSTRIES, INC.**

**No. 02-1258**

***MEMORANDUM***

BAYLSON, District Judge.

**I. Jurisdiction, Procedural Background, and  
Summary**

Plaintiff Harrison Aire, Inc., an owner and operator of hot air balloons, filed this action on March 12, 2002, alleging that Defendants Aerostar International, Inc. and Raven Industries, Inc. (Aerostar's corporate parent) operated their hot air balloon business in violation of Sections 1 and 2 of the federal antitrust laws. 15 U.S.C.

§§1 & 2. Plaintiff also makes state law allegations of fraud and negligence. This Court has jurisdiction over Plaintiff's claims under 28 U.S.C. §§1331, 1332, and 1337 and 15 U.S.C. §15. Venue is proper under 28 U.S.C. §1391(b). Presently before the Court is Defendants' Motion for Summary Judgment (Docket No. 12). The Court held oral argument on January 27, 2004, and the parties submitted supplemental briefs on April 2, 2004.

Defendants move for summary judgment on three grounds. For the reasons which follow, Defendants' motion will be granted, and the Court summarizes its rulings as follows:

One: Defendants' contention that Plaintiff's antitrust claim is barred by the four-year statute of limitations applicable to antitrust claims is rejected as presenting an issue of fact. (*See infra* pp. 202-203.)

Two: Defendants claim that summary judgment is warranted upon application of implied immunity to Plaintiff's antitrust claims is rejected as a matter of law. (*See infra* pp. 205-206.)

Three: Defendants argue that Plaintiff cannot succeed in proving the requisite elements for its antitrust, fraud, or negligence claims, thus justifying summary judgment

against Plaintiff. The Court concludes that Plaintiff has not adduced sufficient facts to warrant a trial on its antitrust claims and the Court will grant summary judgment for Defendants, as to Counts I and II. (See *infra* pp. 213-224.)

## **II. Factual Background**

### **A. Description of Parties and Ballooning Industry<sup>1</sup>**

Plaintiff Harrison Aire, Inc. is a New Jersey corporation in the business of providing commercial balloon hot air

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<sup>1</sup>The record on Defendants' Motion consists of excerpts of depositions of Plaintiff's President, Defendant's employees, three Federal Aviation Administration officials, and three other witnesses with experience in the hot air balloon industry. Defendants have submitted excerpts of their hot air balloon maintenance manuals, some correspondence between the FAA and a third party (Ronald DiGiovanni), a recent company newsletter, and a letter subsequently sent to the newsletter's mailing list that listed corrections to the newsletter. Defendants also have filed two affidavits both sworn by Mark West, President of Aerostar. Plaintiff has submitted an actuarial-economic consultants' report. Plaintiff has not filed any affidavit.

rides, aircraft maintenance, and pilot training for hot air balloons and fixed wing aircraft. (Defs.' Undisputed Facts ¶2.) Its sole owner and proprietor is Terry Harrison.<sup>2</sup> Defendant Aerostar International, Inc. is a hot air balloon manufacturer located in South Dakota. Aerostar International is a wholly owned subsidiary of Raven Industries.<sup>3</sup> Raven Industries preceded Aerostar

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<sup>2</sup>Mr. Harrison has been involved in aviation for several decades. He holds a variety of licenses and certifications qualifying him to fly hot air balloons and fixed wing aircraft. Mr. Harrison is a former flight engineer and co-pilot for Eastern Airlines. He is a licensed FAA Airframe and Powerplant mechanic with inspection authority. This certification authorizes him to perform maintenance work on many types of aircraft, including hot air balloons. He served ten years as an accident prevention counselor and designated pilot examiner. (Harrison Dep., Defs.' Ex. B, at 12-16; Defs.' Undisputed Facts ¶3.)

<sup>3</sup>Although no suggestion has been made that Aerostar and Raven have conspired to violate the antitrust laws, the Court notes that a parent company and its wholly owned subsidiary are incapable of conspiring with each other for antitrust purposes. *Copperweld Corp. v. Independence Tube Corp.*, 467 (continued...)

International in the manufacture of hot air balloons, but formed Aerostar International in 1986 for the purposes of undertaking the hot air balloon aspect of the company's business. (*Id.* ¶ 6.) Raven Industries has not manufactured hot air balloons since February 1986; rather, Aerostar International, as its wholly owned subsidiary, has fulfilled that role. (Compl.¶ 14.) During the 1970s and 1980s, Harrison Aire purchased hot air balloons for its flight operations from Raven Industries, and subsequently from Aerostar Industries.

Hot air balloons are comprised of three principal components: the basket (which contains the balloon's instruments and occupants); the fuel and heater system (which produces the hot air); and the envelope (which contains the hot air). (Compl.¶ 10.) With use and age, balloon envelopes deteriorate, with the top hemisphere of the envelope deteriorating much more quickly than the lower hemisphere. (*Id.* ¶ 12.) After approximately 300-500 hours of use (actual mileage may vary), because of this deterioration, at least the upper portion of the envelope must be replaced in order to continue piloting safely. (*Id.*) This replacement typically extends the life of the envelope for another 200-300 hours. (*Id.*) In general, replacement of the fabric in the upper

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<sup>3</sup>(...continued)

U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984).

hemisphere of the envelope is significantly less costly than replacement of the entire envelope. Because of design and wear patterns, replacement of up to 80% of the envelope fabric (somewhat more than the top half of the envelope) is generally most practical and economical. (*Id.* ¶ 13.)

### **B. Federal Regulations Applicable to Hot Air Ballooning**

At the heart of this case are issues regarding replacement fabrics for the envelope for Raven/Aerostar hot air balloons. Although these issues were present in the 1980s, the present case centers on events beginning in late 1995 or early 1996. Plaintiff needed to buy replacement fabric for one of its Raven/Aerostar balloons, and believed the balloon's accompanying manual restricted its abilities to purchase replacement fabric. The plaintiff contends that the defendants issued fraudulent statements that purportedly required the users and owners of Defendants' hot air balloons to buy replacement fabric from the defendants, whose fabric was more expensive than third-party fabric. The defendants, on the other hand, assert that federal regulations did require that owners of Raven/Aerostar hot air balloons had to purchase replacement fabric from either Defendants or a limited number of entities that made replacement fabric in satisfaction of

Defendants' standards. Thus, in understanding the regulatory parameters of this case, the Court first sets out the federal regulations at issue.

**1. Manufacturer-Provided Instructions for  
Balloon Owners: Instructions for Continued  
Airworthiness and Airworthiness Limitations  
Section**

Ballooning in the United States is regulated by the Federal Aviation Administration, which has promulgated regulations-the Federal Aviation Regulations or the Federal Rules of Aviation ("FARs")-that apply *inter alia* to the replacement of balloon envelope fabric. The regulations generally require that major balloon repairs, such as the replacement of significant areas of envelope fabric, be performed by a repairman or mechanic certified by the FAA. Since 1980, FAA regulations require balloon manufacturers to publish a maintenance manual for their product; this manual is known as "Instructions for Continued Airworthiness" ("ICA"). 14 C.F.R. § 31.82.<sup>4</sup> Section 31.82 provides:

The applicant must prepare Instructions

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<sup>4</sup>The regulations cited within this section have been in effect since 1980 or earlier.

for Continued Airworthiness in accordance with Appendix A to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first balloon or issuance of a standard certificate of airworthiness, whichever occurs later.

*Id.*<sup>5</sup> A hot air balloon manufacturer must provide this model-specific ICA to each purchaser of its product. 14

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<sup>5</sup>The aircraft manufacturer holds the "type certificate" for the aircraft, which constitutes the FAA's approval of the design of the aircraft. (Pl.'s Undisputed Facts ¶ 49.) The FARs establish the procedure for securing type certification for new aircraft designs, from the manufacturer's own analysis and testing of the design to the FAA's review of those engineering data before determining airworthiness. 14 C.F.R. §§ 21.11-21.53. "[E]very aircraft that's out there with an airworthiness that's flying around needs to be type certificated or receive a type certificate from the FAA, essentially saying that the design complies with the airworthiness regulation." (Michalik Dep., Pl.'s Ex. D & Defs.' Ex. G, at 9.)

C.F.R. § 21.50. Section 21.50 provides in pertinent part:

(b) The holder of a design approval, including either the type certificate or supplemental type certificate for an aircraft ... shall furnish at least one set of complete Instructions for Continued Airworthiness, prepared in accordance with [§ 31.82] to the owner of each type of aircraft ... upon its delivery, or upon issuance of the first standard airworthiness certificate for the affected aircraft, whichever occurs later, and thereafter make those instructions available to any other person required by this chapter to comply with any of the terms of these instructions.

*Id.*

Generally, the maintenance standards and procedures specified in the ICA are permissive in nature ("FAA accepted") in that maintenance personnel may substitute other "FAA accepted" maintenance standards and procedures. 14 C.F.R. § 43.13. Section 43.13 provides in relevant part:

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, *or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16....*

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition ....

*Id.* (emphasis added).

However, if a manufacturer or the FAA chooses to require a particular maintenance standard or procedure, that particular standard or procedure must be published in a separate and distinct portion of the ICA, known as the Airworthiness Limitations Section ("ALS"). Part A31.4 of Appendix A to Part 31-Instructions for

Continued Airworthiness defines the ALS portion and specifies how the manufacturer should present the ALS to the balloon owner. Part A31.4 reads:

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure, including envelope structural integrity, required for type certification. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: "*The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.403 of the Federal Aviation Regulations.*"

*Id.* (emphasis added). In contrast to an ICA's maintenance standards, which may be replaced by other

“FAA accepted” maintenance procedures, maintenance personnel are required to adhere strictly to the provisions of an Airworthiness Limitations Section, if one exists. 14 C.F.R. § 43.16. Section 43.16 states in relevant part, “Each person performing an inspection or other maintenance specified in an Airworthiness Limitations section of a manufacturer’s maintenance manual or Instructions for Continued Airworthiness shall perform the inspection or other maintenance in accordance with that section ....” *Id.*

## **2. Replacement Parts for Hot Air Balloons**

The FAA also has instituted a regulatory scheme that governs the manufacture and sale of replacement parts. When the FAA approves an aircraft, it issues a type certificate under Part 23 of its regulations. 14 C.F.R. § § 21.11-21.53. For example, as a type certificate would be for the whole aircraft (*e.g.*, Waligunda Dep., Pl.’s Ex. F, at 21)<sup>6</sup>, Defendants would hold the type certificate

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<sup>6</sup>Robert Waligunda was a distributor for Defendants for a number of years. Defendants terminated him allegedly because he “blew the whistle” regarding Defendants’ purportedly deceptive manual. (Waligunda Dep., Pl.’s Ex. F, at 66.) Mr. Waligunda is an experienced hot air balloonist, having been involved  
(continued...)

for each of their separate hot air balloon designs. The FAA must also approve modifications to a particular aircraft, whether designed by the original manufacturer or a third-party, after which the FAA issues a supplemental type certificate ("STC"). 14 C.F.R. § 21.113. An STC would enable its holder to manufacture a component or a part for a balloon system, e.g., a balloon envelope. (Waligunda Dep., Pl.'s Ex. F, at 20; DiGiovanni Dep., Pl.'s Ex. B, at 26-27.) Any person, in addition to the original manufacturer, may petition the FAA for a Parts Manufacturer Approval ("PMA"), which allows the holder to manufacture and sell specific replacement parts directly to aircraft owners. 14 C.F.R. §21.303 ("[N]o person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval ...."). A PMA covers a part, such as the balloon fabric itself. (Waligunda Dep., Pl.'s Ex. F, at 21; DiGiovanni Dep., Pl.'s Ex. C, at 27-28.)

The Court concludes that the regulatory language makes clear the FAA has created a mechanism by which third-parties can be approved to manufacture and sell

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<sup>6</sup>(...continued)

in the industry for thirty-five years and having logged over 5000 hours in flight. (*Id.* at 19-20.)

replacement parts for hot air balloons. The FARs do not mandate that replacement fabric has to be of the same manufacture as the balloon, nor could any manufacturer impose such a requirement in their ICAs, given that the ICAs need not be followed strictly by their owners. The Court presumes that were a hot air balloon manufacturer to place such restrictions in its ALS, which is not the case here, the balloon's owner then would be obligated to follow that language.

In this case, Defendants' ICA purportedly implied that only replacement parts approved for use by Raven/Aerostar could be used in repairing Raven/Aerostar hot air balloons.<sup>7</sup> As stated above, there is no requirement in the FARs that replacement

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<sup>7</sup>Mr. Waligunda testified that sometime before May 1982, concerned that its competitors would produce replacement envelopes for Raven balloons, Raven allegedly "made [its] manual stronger" by seemingly telling Raven owners that they had to buy Raven fabric exclusively. (Waligunda Dep., Pl.'s Ex. F, at 17-19.) Because only the manual's ICA portion was changed-a non-mandatory section-Raven knew that its customers would remain technically free to purchase third-party parts; Raven allegedly hoped, though, that the limitation would appear mandatory to the uneducated person. (*Id.* at 24.)

envelope material be tested in accordance with the *manufacturer's* standards. In fact, before Defendants even published their ICA, the FAA already had set forth its own standards for strength and safety, 14 C.F.R. §§ 31.21-31.27, which must be met by all manufacturers and replacement parts manufacturers, including holders of STCs and PMAs. As the parties have not submitted copies of Defendants' ALS and as the parties have focused their arguments on perceptions surrounding Defendants' ICA, the Court presumes that any and all allegedly offensive, restrictive language is contained in the ICA and that there are no restrictions on third-party fabric whatsoever in Defendants' ALS.

## **C. Chronology of Events**

### **1. Plaintiff's Business**

Harrison Aire is a corporation which derives its income from selling hot air balloon rides to members of the general public. (Harrison Dep., Defs.' Ex. B, at 28.) In the late 1970s, Mr. Harrison purchased his first Raven-made balloon. (Harrison Dep., Pl.'s Ex. H, at 154.) In 1986, he purchased the "Big Ride" balloon from Defendants. (Actuarial-Economic Consultants Report,

Pl.'s Ex. A, at 2.)<sup>8</sup> Since 1986, Plaintiff has had five or six conversations with Defendants' agents about the language in their ICAs restricting third-party fabric, and each time Defendants responded with the same "buy our fabric" answer. (Harrison Dep., Pl.'s Ex. H, at 159-61.) In the late 1980s, having considered the venture, Mr. Harrison decided not to enter the replacement fabric business himself. (Harrison Dep., Defs.' Ex. D & Pl.'s Ex. I, at 48-49.)

Plaintiff's "Big Ride" balloon needed repairs to its envelope in 1995, which would have extended the life expectancy of the balloon another ten years. (Pl.'s Undisputed Facts, ¶ 8; Defs.' Undisputed Facts ¶ 8.) Plaintiff earlier had stockpiled sufficient amounts of Defendants' balloon fabric (purchased at 50% of cost from Raven/Aerostar distributors) for use when any of his balloon envelopes became unairworthy (Defs.' Undisputed Facts ¶ 7), but had exhausted his stockpiled resources when his "Big Ride" balloon required repairs. (*Id.* ¶ 8; Harrison Dep., Defs.' Ex. B, at 112-13.)

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<sup>8</sup>The Court cites this expert report, which is not sworn testimony but is undisputed in the record, to connect Plaintiff's retired "Big Ride" balloon to Defendants. The parties have not identified-and the Court has not located-any sworn testimony that links Plaintiff's balloon with Defendants.

Plaintiff claims it could not afford to purchase Defendants' fabric at this time, and instead investigated buying less-expensive third-party parts. (Harrison Dep., Defs.' Ex. C, at 35; Harrison Dep., Defs.' Ex. D, at 67.) According to Robert Waligunda, a former Raven/Aerostar distributor, Defendants' fabric was more expensive than any other fabric on the market. (Waligunda Dep., Pl.'s Ex. F, at 67.)

Plaintiff long had criticized Defendants' ICA for purportedly implying that only replacement parts approved for use by Raven/Aerostar could be used in repairing Raven/Aerostar hot air balloons. In meetings with Defendants and their representatives, Mr. Harrison frequently inquired whether this policy had changed and was repeatedly informed that Defendants' stance remained firm. Regarding Plaintiff's interaction with Raven in particular, Mr. Harrison's deposition proceeded as follows:

Q. What was your particular complaint to Raven then if you didn't believe it was misleading? What was your particular complaint?

A. The complaint ~~was~~ if-if the manufacturer is providing or a supplier is providing the same material to Raven, and it's available directly at half the cost to someone else, same fabric, and the same factory is saying, "We make it for Raven, and the same specs

coming off the same mills, the same run, the same colors and everything. We'll provide it to you directly."

Q. Would it be - go ahead. You finish.

A. And Raven said, "No. You can't do that."

.....

Q. Did you ever get any resolution of that issue that you took with Raven from Raven?

A. No.

(Harrison Dep., Pl.'s Ex. H, at 157-58.) Regarding Plaintiff's interaction with Aerostar in particular, Mr. Harrison's deposition proceeded as follows:

Q. When you received your first Aerostar manual, did it have the same type of provision regarding replacement fabric that you complained about with Raven?

A. Yes.

.....

Q. Do you remember what your specific complaint to [Aerostar] was?

A. I had two or three items, maintenance items that I wanted to discuss that I was having problems with. Then when I brought those items up, I just want to see if their position was still the same on the fabric.... So there's probably been through the years five or six conversations that I had over other things, and at the

end I always said, "By the way, has your position on fabrics changed?"

Q. And the answer was?

A. "As long as you buy the fabric, we don't care what you do," basically. The emphasis, "buy the fabric."

Q. In any event, is it fair to say that you registered the complaint with Aerostar at its inception or shortly thereafter, within a year or two, that you did with Raven and didn't get any change

A. Correct.

Q. Okay. And that particular complaint, and correct me if I'm wrong, but the particular complaint was that the manual required you to purchase fabric from Aerostar or Raven before it and only Aerostar or Raven before it?

A. Correct.

(*Id.* at 159-62.)

In 1995, there were only three possible purveyors for fabric sales: Defendants (the manufacturer); Custom

Nine Designs, run by Ronald DiGiovanni;<sup>9</sup> and Head Balloons;<sup>10</sup> these were the only lawful market options available to Harrison Aire. (Defs.' Undisputed Facts ¶¶ 9-10.) Mr. Harrison met with Mr. DiGiovanni in 1995 or 1996 to discuss purchasing replacement fabric for Plaintiff's Raven/Aerostar balloons. (*Id.* ¶ 11.) Plaintiff decided not to purchase Mr. DiGiovanni's fabric-which was "much cheaper" than Defendants' own (Waligunda Dep., Pl.'s Ex. F, at 28)-concluding that any purchase would conflict with the Defendants' ICA restrictions on third-party fabric, even though Plaintiff knew the FAA had certified Mr. DiGiovanni to produce and sell Raven/Aerostar fabric. (Defs.' Undisputed Facts ¶¶ 12-14; Harrison Dep., Defs.' Ex. B, at 124-

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<sup>9</sup>In 1994, Ron DiGiovanni started Custom Nine Designs, a competitor of Defendants authorized by the FAA to sell replacement fabric for certain balloons manufactured by Defendants. (Waligunda Dep., Pl.'s Ex. F, at 26.) The record includes excerpts of Mr. DiGiovanni's deposition.

<sup>10</sup>Head Balloons joined the market in approximately 1984. (West Aff. of Nov. 2003 ¶ 13.) Head Balloons, run by Tarp Head and based in Georgia, has an STC to produce replacement fabric. (Waligunda Dep., Pl.'s Ex. F, at 21-22.) There is no testimony in the record from Head Balloons.

28.) Mr. Harrison provided two reasons for not purchasing Mr. DiGiovanni's fabric, notwithstanding Mr. DiGiovanni's apparent FAA authorization to sell the replacement parts: One, that Mr. DiGiovanni could not confirm that his fabric was "equal to or better" than Defendants' fabric, as Mr. Harrison believed Defendants' manual required (Harrison Dep., Defs.' Ex. B, at 127); and two, that Mr. DiGiovanni was involved in a "bait and switch" ruse in which he had secured FAA approval with one product, but then switched the product with a substandard "knock off," selling the shoddy substitute to unknowing, less discerning customers (Harrison Dep., Defs.' Ex. D, at 36-37).

Without replacement fabric, Plaintiff retired the "Big Ride" balloon in 1996, never to use it again commercially (Defs.' Undisputed Facts ¶ 17), and Plaintiff seeks damages for the alleged inability to use it, due to Defendants' misconduct.

In 2001 or 2002, Plaintiff noticed that the Defendants' manual specifically allowed for third-party replacement fabric, mentioning only that STC holders (but not PMA holders) may repair Raven/Aerostar hot air balloons. (Pl.'s Undisputed Facts ¶ 35.)<sup>11</sup>

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<sup>11</sup>According to Plaintiff's Statement of  
(continued...)

## 2. Defendants' Business

Defendants manufacture and sell hot air balloons, cold air inflatables, helium inflatables, remote control blimps, inflatable costumes and mascots, and specialty sewn products. <http://www.aerostar.com>. In 1981, Raven first made replacement fabric specifically for a competitor's balloon. (Waligunda Dep., Pl.'s Ex. F, at

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<sup>11</sup>(...continued)

Undisputed Facts, “[Mr.] Harrison has testified that he did not realize that he was not required to use Aerostar fabric until [Mr.] DiGiovanni told him about the result in *Braden's [Balloons]*.” (*Id.* ¶ 84.) *Braden's Balloons* is discussed below at Section II.C.3. However, the Court notes that Plaintiff fails to cite any testimonial evidence supporting this contention, and upon independently reviewing the excerpts of Mr. Harrison's depositions submitted to the Court, the Court concludes that the record does not support this assertion. Notwithstanding this discrepancy, the relevant date for purposes of this Motion, as discussed below in the “Statute of Limitations” section, is the date on which Defendants removed their allegedly restrictive ICA language and not the date on which Plaintiff actually learned about third-party fabric alternatives.

11.)<sup>12</sup> In 1982, Raven introduced new language into its balloon owners' manual that required owners either to buy replacement fabric from Raven itself or to secure Raven's approval in advance if purchasing third-party fabric. (Waligunda Dep., Pl.'s Ex. F, at 18-19.) Plaintiff complained to Raven, some time before 1986, about the ICA language. (Harrison Dep., Pl.'s Ex. H, at 156-58.) Raven formed Aerostar International in 1986 for the purposes of taking over the hot air balloon aspect of Raven's business. Raven Industries has not manufactured hot air balloons since February 1986; rather, Aerostar International, as its wholly owned subsidiary, has fulfilled that role. (Compl. ¶14.) After the inception of Aerostar, the Defendants' ICA language read as follows:

### **WARNING**

Only fabric which has been tested and approved according to AEROSTAR (Raven) factory standards may be used for repair of AEROSTAR (Raven) envelopes.

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<sup>12</sup>The parties dispute whether Raven's decision conflicted with a gentlemen's agreement among balloon manufacturers not to produce replacement parts for a competitor's product. (Pl.'s Mem. at 5; Defs.' Reply Mem. at 4; *see also* Waligunda Dep., Pl.'s Ex. F, at 13.)

*Failure to comply with this requirement constitutes a departure from type design and renders the balloon unairworthy.*

(Defs.' Supplemental Ex. B.)<sup>13</sup>

In 1993, Defendants revised the language in their ICAs. (West Aff. of Nov. 2003 ¶9.) In 1993, the ICA language read as follows, in pertinent part:

**6.0 STANDARD PROCEDURES FOR  
REPAIR AND REPLACEMENT**

.....  
**WARNING**

**Improper repairs will render the aircraft unairworthy until repaired properly.**

Likewise, repair/replacement materials must be obtained from Aerostar to be considered a "certified part". In the event that repair materials are obtained, the supplying company or the repair station performing the repair must act to "certify"

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<sup>13</sup>See *supra* text accompanying note 7.

the material and part as equal to or better than the original equipment.<sup>14</sup>

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### **6.1.2 Fabric Repair and Replacement**

#### **WARNING**

**Only fabric which has been tested and approved according to AEROSTAR (Raven) factory standards may be used for repair of AEROSTAR (Raven) envelopes. Failure to comply with this requirement constitutes a departure**

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<sup>14</sup>It appears obvious that the two sentences in this paragraph are contradictory. In 1995, the second sentence of this paragraph was changed to read, "In the event that non-Aerostar repair materials are obtained elsewhere, the supplying company or the repair station performing the repair must act to 'certify' the material and part as equal to or better than the original equipment." (West Aff. of Nov. 2003 ¶ 9 & Ex. B.) Even with the correction, these two sentences remain contradictory.

**from type design and renders the balloon unairworthy.**

### **Note**

Fabric replacement is normally limited to 35% of the surface area of the envelope within a period of 100 flight hours or one year, (whichever comes first), except for additional minor patches and repairs. Deviation from this procedure up to 65% total fabric replacement may be approved after consultation with the AEROSTAR (Raven) factory. Such extensive replacement may only be undertaken if approved *in writing* by AEROSTAR (Raven). To protect the integrity of manufacturers' type designs, "100% rebuilding" of balloon envelopes is expressly prohibited according to FAR 43.13.

**FOR APPROVAL TO REPLACE MORE THAN 35% OF THE ENVELOPE FABRIC, please contact:**

Dee M. Rose  
Aerostar International, Inc.

Customer Service  
1812 "E" Avenue, PO Box 5057  
Sioux Falls, SD 57117-5057  
605/331-3500 Fax 605/331-2547

(Defs.' Supplemental Ex. C.)

According to Plaintiff, Defendants again changed their ICA language in 2001, removing the language that required Defendants' permission before replacing more than 35% of the envelope fabric and the "WARNING" that failure to use fabric which has been tested and approved according to Aerostar factory standards would make the balloon unairworthy. (Pl.'s Mem. Opp'n Summ. J. at 13.)

### **3. *Braden's Balloons* and Ronald DiGiovanni**

In 1996, Braden's Balloons Aloft, Inc., an FAA-approved repair station, replaced between 54% and 64% of a Raven/Aerostar balloon's envelope fabric with material from Custom Nine Designs without first obtaining Defendants' written permission. *In re Braden's Balloons Aloft, Inc.*, FAA Docket No. CP99SWO037, at \*1 (July 26, 2000) (Defs.' Ex. O) [hereinafter *Braden's Balloons*]. The FAA prosecuted Braden's in an administrative civil penalty action, on the theory that Braden's had violated various regulations by

failing to follow Defendants' ICA requirement that maintenance personnel secure written permission before performing the replacement. Even though Mr. DiGiovanni, President of Custom Nine Designs, has no formal legal training, Mr. DiGiovanni represented Braden's in the administrative action.

The Administrative Law Judge dismissed the FAA's complaint, concluding that the FAA had failed to allege facts that, if proved, would have established the elements of the violations of the FARs with which Braden's had been cited. For example, the FAA complained that Braden's failed to comply with Defendants' ICA by replacing the envelope fabric without Defendants' permission, but the FAA had failed to allege that Braden's replaced the fabric in a manner not otherwise acceptable to the FAA, a fatal pleading defect considering that procedures listed in a balloon's ICA (unlike those in the balloon's ALS) may be substituted for other FAA-accepted methods. *Braden's Balloons, supra*, at \*6. In his opinion supporting dismissal, the ALJ observed:

[T]he Complaint lists an alleged violation of FAR § 43.16. This section requires that, if one performs an inspection or maintenance specified in an Airworthiness Limitations section of a manufacturer's

maintenance manual or Instructions for Continued Airworthiness, such an inspection or maintenance must conform to that Airworthiness Limitations section. Thus, unless the requirement that Braden's receive written permission for the extensive envelope repair it performed on N57199, is contained in the Airworthiness Limitations section of the maintenance manual or Instructions Continued Airworthiness promulgated by AeroStar (Raven), Braden's would not be required to comply with such a requirement.

The Complaint does not state whether or not such a requirement is contained in the Airworthiness Limitations section of the maintenance manual or the Instructions for Continued Airworthiness. It merely states that such a requirement is a part of the Instructions for Continued Airworthiness, without making clear, one way or another, whether it is specifically located in the Airworthiness Limitations Section. The difference is important, as whether it is required or not hinges on its location. If located within the Airworthiness Limitations section, it is approved by the Administrator and a person performing an

inspection or maintenance must follow its prescription. See 14 C.F.R. Part 31, App. A, § A31.4. However, if not located within the Airworthiness Limitations' section, the inspection and maintenance information is only accepted by the Administrator, and there is no requirement to follow the manufacturer's instructions. A deviation from those instructions will not result in a violation in § 43.16 so long as the inspection or maintenance falls under the "other methods, techniques, and practices acceptable to the Administrator" language of FAR § 43.13(a). Because the Complaint fails to specifically allege that the requirement, that Braden's consult with Aerostar (Raven) prior to performing the fabric replacement, is found in the Airworthiness Limitations section of the Aerostar (Raven) Instructions for Continued Airworthiness, this claim must also fail.

(*Braden's Balloons*, *supra*, at \*7-8) (emphasis removed). Defendants downplay the relevance and applicability of *Braden's Balloons* to the instant case by referring to *Braden's Balloons* as an "irrelevant," "unrelated, insignificant administrative action." (Defs.'

Reply Br. at 5 & n. 2.) While the Court recognizes that the ALJ dismissed the case for defects within the pleadings, it is important to note the distinction which the ALJ made between the mandatory Airworthiness Limitations Section (ALS), and the Instructions for Continued Airworthiness, which may be substituted by alternate methods, techniques, and practices acceptable to the Administrator. As explained below, this distinction is of great relevance to the claims and issues presented in this case.

Mr. DiGiovanni had taken it upon himself to inform the ballooning community of the case's result and of his interpretation of the case's precedential value, most notably through his privately maintained website, <http://home.earthlink.net/~airnon>, which chronicles the *Braden's Balloons* saga. In a September 7, 2000 response to Mr. DiGiovanni's trumpeting, Defendants made the following representation in a letter to Raven/Aerostar owners:

We are extremely concerned with the recent mailing which claims that the ruling in *FAA v. Bradens* "effectively nullifies the Aerostar Instructions for Continued Airworthiness manual." This is patently false and seems to suggest ignoring the Airworthiness Manual which would pose

possible significant risk to balloon owners, operators and passengers. The ruling in this case was, simply, that the FAA had not met the correct technical pleading requirements in its complaint and, accordingly, the complaint was dismissed. The ruling did not nullify the Aerostar Instructions for Continued Airworthiness manual and we urge you to follow the procedures contained in the manual as well as all applicable FAA rules and directives. We have been in contact with various offices within the FAA and have their full agreement, based on the FAR's and the requirements within the FAA Type Certificate Data Sheet that "all inspections, repairs, and replacements must be accomplished in accordance with the latest issue of Aerostar Instructions for Continued Airworthiness."

(Pl.'s Mem. Opp'n Summ. J. at 14-15, emphasis removed; also available at [http://home.earthlink.net/~airoron/new\\_page\\_80.htm](http://home.earthlink.net/~airoron/new_page_80.htm).) According to Plaintiff, Mr. Harrison has testified that he did not realize he was not required to use Aerostar

fabric until Mr. DiGiovanni told him about the result in *Braden's Balloons*. (Pl.'s Undisputed Facts ¶ 84.)<sup>15</sup>

According to Plaintiff, Defendants changed their ICA language in 2001, removing the language that required Defendants' permission before replacing more than 35% of the envelope fabric and the "WARNING" that failure to use fabric which has been tested and approved according to Aerostar factory standards would make the balloon unairworthy. (*Id.* at 13.) Plaintiff suggests that Defendants undertook these revisions at the stern request of the FAA, supposedly "stung by the result in *Braden's* " and "prodded unmercifully by Custom Nine." (*Id.*, citing Michalik Dep., Pl.'s Ex. D, at 72.)

### **III. Plaintiff's Allegations**

Plaintiff brings four counts against Defendants (Antitrust-Monopolization; Antitrust-Tying Arrangement; Fraud; and Negligence). As stated above, Plaintiff is a corporation that derives its income from selling hot air balloon rides to the public. Plaintiff alleges that Raven Industries consciously developed and implemented several schemes to deceive balloon owners and to convince them that federal law required the exclusive use of Raven Industries fabric in the

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<sup>15</sup>See *supra* text accompanying note 11.

repair and replacement of hot air balloon envelopes originally purchased from Raven. (Compl. ¶ 19; *see also* Waligunda Dep., Pl.'s Ex. F, at 24-25.) Plaintiff alleges that after its incorporation, Aerostar International assumed continued responsibility for implementing and maintaining the original schemes, with the full knowledge, participation, and consent of the directors and officers of Raven, its parent corporation. (Compl. ¶ 19.) As a direct and proximate result of Defendants' behavior (to be detailed below), Plaintiff claims it could not afford to purchase replacement envelope fabric directly from Defendants for one of its hot air balloons-its "big ride" balloon-and was therefore unable to utilize that particular balloon commercially after 1996. (*Id.* ¶ 28.) Plaintiff apparently could have afforded to replace the envelope fabric had Plaintiff thought it was permitted to use third-party fabric, and Plaintiff contends that it would have indeed purchased the third-party fabric if the defendants had not implemented the scheme described above. (*Id.* ¶ 29.) Plaintiff claims economic losses totaling \$35,000 per year (at least) from 1996 continuing through the present. (*Id.* ¶ 30; Actuarial-Economic Consultants Report, Pl.'s Ex. A.)

## **A. Defendants' Alleged Schemes**

In its complaint, Plaintiff describes three schemes purportedly undertaken by Defendants that constitute a violation of federal antitrust law.

### **1. Scheme One**

According to Plaintiff, Raven Industries officers expressed their interest and desire in controlling the replacement fabric market at various meetings between Raven Industries and its distributors during the 1980s. At one meeting, shortly before Raven Industries created AeroStar International, Raven Industries officers allegedly advised the attendees, among whom was at least one distributor, that its maintenance manual ("Instructions for Continued Airworthiness" or "ICA") would be changed in order to control the replacement fabric market. (Compl. ¶ 20.B; *see also* Waligunda Dep., Pl.'s Ex. F, at 14-19.)

Plaintiff avers that Raven Industries deliberately inserted language into its ICA that appeared to require balloon owners either to use only Raven/AeroStar replacement fabric or to secure Raven/AeroStar approval before obtaining replacement fabric elsewhere. Plaintiff contends that at this meeting, at least one distributor in attendance raised concerns that the

proposed manual language would run afoul of federal antitrust laws, and that Raven Industries officers replied that the inserted language would simply “imply” that federal regulations required the owners to use Raven replacement fabric. (Compl. ¶ 20.C; *see also* Waligunda Dep., Pl.’s Ex. F, at 23-25.) These officers allegedly told the attendees that because the inserted language appeared in the ICA (which would not require strict compliance), and not in the Airworthiness Limitations Section (which would have required strict compliance), there would be no actual antitrust violation. (*Id.*) Plaintiff claims that this scheme was implemented in 1986, ten days after the incorporation of Aerostar International.

As stated above, Section 43.13 of the FARs requires that with limited exceptions, all repairs of any type be performed consistent with the ICA. That is, according to this FAR, a hot air balloon repairman should follow the methods listed in the manufacturer’s ICA or an alternative method acceptable to the FAA. 14 C.F.R. § 43.13. Furthermore, this FAR directs a hot air balloon repairman to use materials that equal or surpass the manufacturer-supplied originals in order to create a (repaired) balloon that will be at least equal to its original condition. *Id.*

The parties do not dispute that the FAA has regulated the repairs of hot air balloons. (Tr. at 18.) What the parties do dispute, and what centrally defines Plaintiff's action against Defendants, is whether Defendants acted appropriately in 1993 and 1995 (*see supra* pp. 14-16 and notes 7 & 13) by inserting language that required Raven/Aerostar balloon owners either to use Defendants' own fabric in repairs or to secure Defendants' written permission before using third-party fabric. According to Plaintiff, nothing in the FARs requires a balloon owner to use the manufacturer's own fabric in repairs or to secure the manufacturer's written approval before using third-party fabric. (Compl. ¶ 20.F.) Plaintiff criticizes Defendants' WARNING language, which specified that, under penalty of unairworthiness, Raven/Aerostar factory standards were to be applied when testing third-party fabric, especially since the FAA regulations provide separate standards for strength and safety, 14 C.F.R. § § 31.21-31.27, which must be met by all manufacturers and replacement parts manufacturers, including holders of STCs and PMAs.

Plaintiff further contends that Defendants inserted language that appeared to require, at penalty of violation of law, that owners get specific approval from Defendants in advance before replacing more than 35% of envelope fabric, and which prohibited replacement of

more than 65% of envelope fabric without the defendants' approval. (Compl. ¶20.E.) Plaintiff alleges that Defendants had arranged the language in such a manner, and with such authority, that it reasonably appeared to balloon owners that federal law and regulations required compliance with these restrictions on envelope fabric replacement. (*Id.* ¶20.G.)

According to Plaintiff, Defendants purposely misled Mr. Harrison-and, by implication, all other Raven/Aerostar balloon owners (*see, e.g.,* Waligunda Dep., Pl.'s Ex. F, at 25)-regarding his rights and alternatives on the matter of repairing envelope fabric for Raven/Aerostar balloons. Plaintiff contends that in practice, and in furtherance of the foregoing scheme, Defendants refused to approve any replacement that did not utilize Raven/Aerostar fabric. (Compl ¶20.H.) In order to reinforce its deception of fabric purchasers, Defendants allegedly contacted FAA officials and persuaded them to initiate the administrative prosecution of a certified repairman (Braden's Balloons Aloft, Inc.), who had failed to obtain Defendants' pre-approval before replacing more than 35% of a balloon envelope's fabric. (*Id.* ¶20.I.)

## 2. Schemes Two and Three

Next, as Plaintiff contends, in order to deal with balloon owners and repairmen not fooled by the foregoing scheme, Defendants' manuals required that third-party fabric be subjected to highly-destructive "tear testing" before the fabric could be used as replacement fabric on Defendants' balloons; this fabric was later subjected to the same testing procedure annually. (*Id.* ¶ 20.J.) Defendants allegedly did not require their own fabric to undergo such testing until it had nearly reached the end of its useful life. (*Id.*) Because the test procedure required that relatively large pieces of fabric be removed for testing and then replaced, both the labor costs involved and the resulting unsightly patches in the envelope deterred owners and repairmen from using third-party fabric, and increased the probability that Aerostar International fabric would be used in the replacement process. (*Id.*)

Third, in order to discourage balloon owners from purchasing third-party fabric, Defendants allegedly defamed at least one third-party manufacturer (Custom Nine Designs, Inc.) by publishing an article in their newsletter reporting fabric strength tests purportedly demonstrating that Custom Nine Designs fabric was unsuitable for use in Raven/Aerostar envelopes. (*Id.* ¶ 20.K.) Plaintiff contends that Defendants knew their

article was untrue and that Defendants refused to retract or correct the story even when its falsity was brought to their attention. (*Id.*)<sup>16</sup>

The parties have not developed their contentions regarding Schemes Two and Three in the summary judgment context. Plaintiff does not even explain how these acts would constitute antitrust violations. Therefore, for purposes of this Memorandum, the Court mentions these schemes in the interest of describing Plaintiff's allegations in the entirety, but will focus predominantly on Scheme One, finding that the parties have largely ignored Schemes Two and Three.

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<sup>16</sup>In either 1999 or 2000, Defendants published their testing standards for fabric in their manual. (West Dep., Pl.'s Ex. G, at 131.) Defendants started subjecting competitors' fabric along with their own to these newly announced testing standards, and published the results in a newsletter mailed to Raven/Aerostar owners in either 1999 or 2000. (*Id.*) A typo in the newsletter misrepresented the results for fabric produced by Ron DiGiovanni and Custom Nine Designs and indicated that that fabric is unsafe for use with Raven/Aerostar balloons. Defendants claims they corrected any error by subsequently mailing a correction letter to the same mailing list three months later. (West Aff. of Jan. 2004 ¶ 5.)

## **B. Plaintiff's Counts Against Defendants**

### **1. Count One: Antitrust-Monopolization**

Plaintiff asserts that Defendants possessed monopoly power in the Raven/Aerostar hot air balloon replacement fabric market in the United States. (Compl. ¶32.) In the alternative, even if Defendants had not actually possessed monopoly power in the relevant market, their acts were intended as an attempt to monopolize the Raven/Aerostar envelope replacement fabric market. (*Id.* ¶34.) Defendants' alleged acts supposedly constituted impermissible exclusionary practices under Section 2 of the Sherman Act, practices which were designed by Defendants to strengthen and to perpetuate their monopoly position. According to Plaintiff, Defendants' acts directly and proximately restrained trade, and directly and proximately caused Plaintiff's damages.

### **2. Count Two: Antitrust-Tying Arrangement**

According to Plaintiff, Defendants possessed monopoly power in the market for the tying product (i.e., hot air balloons) and used this monopoly power to restrain trade in the tied product (i.e., replacement fabric for balloon envelopes). (Compl. ¶38.) This alleged tying

arrangement supposedly substantially affected-and continues to affect-interstate commerce. (*Id.* ¶39.) Defendants' acts, as alleged, directly and proximately restrained trade, and directly and proximately caused Plaintiff's damages. (*Id.* ¶¶40, 42.)

### **3. Count Three: Fraud**

Defendants allegedly intended that Plaintiff and all other Aerostar International balloon owners rely upon these supposed misrepresentations. (Compl.¶44.) Plaintiff contends that it justifiably relied upon these misrepresentations, and that its damages were a direct and proximate result of its justifiable reliance upon the misrepresentations. (*Id.* ¶¶45-46.) Additionally, as represented by Plaintiff, Defendants' conduct was outrageous and warrants the imposition of punitive damages. (*Id.* ¶47 )

### **4. Count Four: Negligence**

Plaintiff alleges that Defendants' conduct was negligent and that its damages were a direct and proximate result of said negligence. (Compl.¶¶49-50.)

#### **IV. Defendants' Motion for Summary Judgment**

Defendants have moved for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325, 106

S.Ct. 2548. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.

Defendants move for summary judgment on three grounds. One: Defendants contend that Plaintiff's antitrust claim is barred by the four-year statute of limitations applicable to antitrust claims. Two: Defendants claim that summary judgment is warranted upon application of implied immunity to Plaintiff's antitrust claims. Three: Defendants argue that Plaintiff cannot succeed in proving the requisite elements for its antitrust, fraud, or negligence claims, thus justifying summary judgment against Plaintiff. The Court will discuss these arguments *seriatim*.

## **A. First Argument: Statute of Limitations**

### **1. Parties' Contentions**

A plaintiff's claim is viable under the federal antitrust provisions only if suit is "commenced within four years after the cause of action accrued," 15 U.S.C. § 15(b), plus any additional number of years during which the statute of limitations is tolled. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. *Id.* According to Defendants, the four-year limitations period commenced in 1996 when Plaintiff's "big ride" balloon was no longer in service and its commercial losses began to accrue.

Defendants note that Plaintiff did not file its complaint until March 2002, almost six years beyond the time Plaintiff claims to have first suffered a loss. Moreover, Defendants contend that Plaintiff's actual knowledge about the source of any losses-i.e., the "restrictive" manual-well predated the retirement of the big ride balloon. Defendants state that Mr. Harrison repeatedly expressed his complaints about the Raven/Aerostar language in the 1970s, 1980s, and 1990s, and contend that Mr. Harrison should not now be heard regarding

damages that would have begun accruing in 1995 and 1996. Further, Defendants argue that given his 1995-1996 visit with its competitor for replacement fabric, Custom Nine Designs, Inc. and Mr. Harrison's general familiarity with the FARs, Plaintiff clearly knew or should have known its legal avenues for fabric replacement as set forth within the FARs.

Defendants emphasize that Mr. Harrison testified that in the late 1980s, he contemplated going into business as a manufacturer of replacement fabric, but did not do so, at least in part due to the allegedly restrictive language within Defendants' ICA. Mr. Harrison opted not to pursue that venture believing that he could not effectively compete with Defendants for business. (Harrison Dep., Defs.' Ex. D & Pl.'s Ex. I, at 48-49.) With Mr. Harrison's longstanding knowledge of Defendants' stance on replacement fabric, Defendants contend that Plaintiff's Complaint-filed more than six years after the retirement of the big ride balloon and decades after his complaints and aborted enterprise-must be dismissed as untimely. Moreover, Mr. Harrison conceded that certain language in Aerostar's ICA indicates that balloon owners could purchase replacement fabric from third-party sources provided

that the third-party held an STC or a PMA,<sup>17</sup> and Mr. Harrison testified that such language would imply that third-party fabric, if so certified, was acceptable. (Harrison Dep., Defs.' Ex. B & Pl.'s Ex. H, at 164-65.) While Mr. Harrison stated that he did not first notice this language until 2003, Defendants argue that such language had been printed in their ICA as early as 1993, thus placing Mr. Harrison on constructive notice since that time. Defendants conclude that Mr. Harrison had everything necessary to pursue his claim in 1996.

Plaintiff alleges that Defendants engaged in fraudulent misrepresentation; to succeed on this claim, Plaintiff must demonstrate that Defendants fraudulently concealed their own unlawful activities and that Plaintiff did not discover these facts despite the exercise of due diligence. *E.g., In re Linerboard Antitrust Litig.*, 203 F.R.D. 197 (E.D.Pa.2001). Plaintiff claims that equitable tolling applies and would have extended

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<sup>17</sup>As explained above at pages 7-8, a hot air balloon envelope can only be repaired with FAA approved replacement parts (fabric falls under the category of "parts") from either: (a) the manufacturer of the product; (b) the holder of a Supplemental Type Certificate ("STC"); or (c) an entity with Parts Manufacturing Approval ("PMA"). 14 C.F.R. § 21.303.

Plaintiff's deadline for suit past its original date. Defendants disagree, arguing that Plaintiff's pre-existing knowledge of the allegedly wrongful conduct defeats its attempt to establish equitable tolling. Defendants also emphasize that Plaintiff failed to exercise any form of due diligence to pursue the alleged wrong. Plaintiff supposedly did nothing between 1996 and 2002 to pursue its legal remedies following the loss of use of his "big ride" balloon and his alleged inability to have it repaired, notwithstanding his longstanding complaints about the manufacturers' language, notwithstanding changes in the Aerostar ICA which alerted the owner to the validity of other replacements, and notwithstanding Mr. Harrison's knowledge of, and access to, the federal regulations that govern this field. Defendants claim there were no efforts to seek redress with calls to the manufacturer, no calls to the FAA, no independent research, no calls for any form of legal representation or advice. Defendants also argue that Plaintiff cannot display any active conduct by the Defendants which would reveal fraudulent concealment or an intention to mislead. Defendants contend that Plaintiff cannot cite one conversation with the defendants, one passage of deposition testimony, one document, or any other evidence that bespeaks fraudulent intentions.

## 2. Analysis

Generally, a cause of action accrues-and the statute of limitations begins to run-when a defendant commits an act that injures a plaintiff. In the context of a continuing antitrust violation, each time a plaintiff is injured by the act of the defendant, a cause of action accrues to the plaintiff to recover damages caused by that act.

However, a suit may be brought more than four years after the events that initially created the cause of action if the defendant commits "an act that by its very nature constitutes a 'continuing antitrust violation.' " *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 n. 2, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). An act constitutes a "continuing antitrust violation" if it injures the plaintiff over a period of time. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n. 5, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). Antitrust law provides that in the case of a continuing antitrust violation each overt act that is part of the violation and that injures the plaintiff, "starts the statutory period

running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997); *see also Hanover Shoe*, 392 U.S. at 502, 88 S.Ct. 2224.

*In re Linerboard Antitrust Litig.*, MDL No. 1261, 2000 WL 1475559, at \*4, 2000 U.S. Dist. LEXIS 14433, at \*16-17 (E.D.Pa. Oct. 5, 2000).

[A] new cause of action may arise from later overt acts in furtherance of a challenged conspiracy or from each injury resulting from a continuing violation. However, to trigger a new cycle of the limitations period, the overt act must specifically affect the plaintiff and not be merely a continuation of the conspiracy. If the plaintiff suffered injury at the beginning of the continuing conspiracy but not thereafter, the plaintiff may not enjoy the benefits of an extended limitations period.

ABA SECTION OF ANTITRUST LAW, ANTITRUST  
LAW DEVELOPMENTS 893-94 (5th ed.2002)  
(footnotes omitted) [hereinafter ABA ANTITRUST].

Defendants thoroughly chronicle Plaintiff's actions since the 1970s that potentially indicate Plaintiff's longstanding awareness of any allegedly offensive behavior, and Defendants essentially argue that Plaintiff's claim should not be considered timely considering its decades-old knowledge of the offending behavior and overall inactivity until only recently. (Harrison Dep., Defs.' Ex. B & Pl.'s Ex. H, at 150-54, 156-58, 159-62; Harrison Dep., Defs.' Ex. D & Pl.'s Ex. I, at 43-44, 46, 47-48.) Defendants claim that in 1993, their ICA first alerted balloon owners that they could purchase third-party replacement fabric instead of directly from Raven/Aerostar. Therefore, even though Mr. Harrison testified that he had not read this language until 2003, Defendants argue that Plaintiff had been on notice of its expanded alternatives for nearly ten years before filing this suit. In 1993, a portion of the relevant ICA language read, "[R]epair/replacement materials must be obtained from Aerostar to be considered a 'certified part'. In the event that repair materials are obtained, the supplying company or the repair station performing the repair must act to 'certify' the material and part as equal to or better than the original equipment." (Defs.' Supplemental Ex. C.) The Court

cannot conclude that this language necessarily placed Raven/Aerostar balloon owners on notice that they could purchase third-party replacement fabric, given that the first and second sentences appear to contradict each other. As Defendants point out, balloon owners are notified that third-party fabric must be certified before use, thus indicating that third-party fabric is acceptable material; however, the preceding sentence states that only materials supplied by Defendants are considered certified. Given that the Court must give the benefit of the doubt to Plaintiff, as the non-moving party, the Court cannot conclude as a matter of law that this language placed Plaintiff and other Raven/Aerostar balloon owners on notice regarding their ability to purchase third-party fabric.

Here, Plaintiff has presented facts that Defendants' predatory acts continued unabated through 2001, at which time Defendants changed the ICA language. According to Plaintiff, it has been harmed by Defendants' antitrust activity continuously until the ICA change, because the company has lost income which it otherwise would have earned had Plaintiff repaired its most profitable balloon.<sup>18</sup> It is undisputed between the

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<sup>18</sup>Had Plaintiff repaired its "big ride" balloon, the balloon would have remained aloft and commercially  
(continued...)

parties that the written change allegedly removing the language offensive to Plaintiff occurred in 2001. Given that Plaintiff filed the instant suit less than four years following Defendants' rewriting of the ICA, there is an issue of fact for trial as to whether the applicable statute of limitations had expired.

In light of case law such as *Linerboard* and *Klehr*, *supra*, which held that, in the context of a continuing antitrust violation, each overt act starts the statutory period running again "regardless of the plaintiff's knowledge of the alleged illegality at much earlier times," *Linerboard*, 2000 WL 1475559, at \*4, 2000 U.S. Dist. LEXIS 14433, at \*17, even though Plaintiff might have realized that it suffered injury each year, assuming Plaintiff filed this case within four years of its last alleged injury, its case is timely and the statute of limitations will not bar these claims from continuing. The Court cannot resolve this issue as a matter of law at this time. Thus, summary judgment will be denied on these grounds.

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<sup>18</sup>(...continued)

viable until 2006, its next anticipated repair date. Plaintiff has submitted an expert report that details the company's economic losses following the retirement of its "big ride" balloon. (Actuarial-Economic Consultants Report, Pl.'s Ex. A.)

## **B. Second Argument: Implied Immunity**

### **1. Parties' Contentions**

The doctrine of implied immunity arises where an alleged violator of the law has acted pursuant to congressional or regulatory authority that conflicts with conduct alleged to be in violation of the antitrust laws. *See generally* ABA ANTITRUST, *supra*, at 1238-40. Because the hot air balloon industry is heavily regulated, Defendants argue that their actions and activities undertaken pursuant to congressional or regulatory authority should be entitled to implied immunity from the federal antitrust laws. Defendants assert they developed their ICAs jointly with the FAA, as they were obligated to do by operation of FAA guidelines, and each successive year after this initial acceptance by the FAA, the ICA remained subject to FAA oversight.

In developing and maintaining their ICAs pursuant to the direct obligation imposed by the FAA, and having worked both with and under the direction of the FAA in creating their ICAs, Defendants contend that they cannot now be held liable in antitrust. At a minimum, Defendants claim they had a reasonable belief that their actions vis-à-vis Plaintiff were appropriate if not

necessary in complying with regulatory and administrative mandates, confirmed by the FAA itself. According to Defendants, to hold them accountable in antitrust would subject them to severe liability for conduct they took in order to ensure aviation safety for hot air ballooning.

## 2. Analysis

This case features the friction that occasionally arises when Congress establishes a regulatory regime which appears inconsistent with the vigorous competition also mandated by Congressional statutes. An express exemption to antitrust liability exists wherever Congress explicitly states that the antitrust laws will not apply to the conduct authorized by the legislation, either in general, or under the specific circumstances enumerated in the legislation. *See generally* ABA ANTITRUST, *supra*, at 1238. By contrast, where a Congressional statute mandates certain behavior, but omits to exempt the behavior expressly from the purview of the antitrust laws, an exemption might need to be implied in order to preserve Congress's regulatory intentions. *Id.* In this case, where the relevant statutes contain no express exemption, Defendants argue that this Court should find that the regulations that

mandated their conduct, now challenged by Plaintiff contain an implied exemption that would insulate Defendants' behavior from antitrust liability.

Defendants have a heavy burden to prove an implied immunity. "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). Implied antitrust immunity is restricted only to the activity challenged, and will not extend to conduct otherwise overseen by the regulatory agency. *See generally* ABA ANTITRUST, *supra*, at 1238. In conformance with these principles, while the Supreme Court has recognized implied immunity from certain prosecutions under the antitrust laws, the Court has steadfastly held that the Federal Aviation Act does not completely displace the antitrust laws. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 387, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 305, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

Whether Defendants are entitled to implied antitrust immunity because they developed, drafted, and

promulgated their ICAs in conjunction with the FAA appears to be a matter of first impression. Only where Congress has invested pervasive supervisory authority in a regulatory agency should a court conclude that Congress intended to ease liability under the Sherman Act. *See, e.g., Nat'l Ass'n, supra.* The Court concludes that Defendants have not established a sufficiently coherent and pervasive theory of regulation, nor do they document any congressional intent that companies in the balloon industry are immune from antitrust litigation by virtue of collaboration with the FAA in drafting and promulgating their ICAs.

#### **a. Federal Regulations Applicable to Hot Air Ballooning**

As discussed above in Section II.B, there are numerous federal regulations that apply *inter alia* to the manufacture and sale of both hot air balloons and replacement parts. To summarize, balloon manufacturers are required to distribute to their customers ICAs, which are model-specific maintenance manuals that detail standards and procedures to be used during maintenance, alteration, or preventive maintenance of the aircraft. These methods or practices generally may be substituted by other maintenance methods or practices acceptable to the FAA. The ICA

might contain a segregated section of additional techniques, known as the ALS, from which maintenance personnel may not deviate. Replacement parts may be manufactured and sold by the aircraft's original manufacturer or by a third-party that holds either an STC or PMA, documents which indicate that the FAA has approved the third-party's product. However, these regulations did *not* require the conduct which Plaintiff contends violated the antitrust laws: for example, no federal regulation requires that a hot air balloon owner first secure the original manufacturer's permission to use third-party fabric before repairing the balloon envelope.

It appears clear from the record that although Defendants' ICA implied that only Defendants-approved replacement parts could be used, there is no requirement in the FARs that replacement envelope material be tested in accordance with the *manufacturer's* standards. In fact, the FAA has set forth its own standards for strength and safety, 14 C.F.R. §§ 31.21-31.27, which must be met by all manufacturers and replacement parts manufacturers, including holders of STCs and PMAs. Thus the Court concludes that both Plaintiff and Defendants have overstated the case. The regulations do not require the defendants to do what they did, and what Plaintiff claims is unlawful under the

antitrust laws. Nonetheless, the Court will review the applicable case law.

## **b. Relevant Case Law**

The starting point in the case law on implied immunity are two Supreme Court opinions that hold that implied immunity from the antitrust laws is to be sparingly inferred from the enactment of a regulatory statute: *Pan American World Airways v. United States*, *supra*, and *Hughes Tool Co. v. Trans World Airlines*, *supra*. The Court notes that neither *Pan American* nor *Hughes Tool Co.* give Defendants any specific support regarding ICAs and implied immunity.

In *Pan American*, *supra*, the United States brought a civil antitrust action against Pan American World Airways, W.R. Grace & Company, and their jointly-owned subsidiary, Pan American-Grace Airways ("Panagra"). When Pan American and Grace organized Panagra, the companies agreed that Panagra and Pan American would not parallel each other's air routes, a combination and conspiracy allegedly in restraint of trade and monopolization and attempted monopolization of air transportation between the United States and South America. The United States further alleged that Pan American had used its control over Panagra to prevent it from obtaining authority from the Civil Aeronautics Board to extend its route from the

Canal Zone to the United States. The district court dismissed the case against Grace and Panagra, finding that none of their practices violated the Sherman Act. Regarding Pan American, however, the lower court concluded that by suppressing Panagra's efforts to extend its route from the Canal Zone to the United States, Pan American had violated the Sherman Act, and ordered Pan American to divest itself of its stock in Panagra.

On direct appeal to the Supreme Court, the Court held that the issues presented had been congressionally entrusted to the Civil Aeronautics Board for resolution, and dismissed the complaint in its entirety. Finding that the limitation of routes and divisions of territories, and the relation of common carriers to air carriers, were fundamental to the regulatory scheme developed by Congress, the Court held that the antitrust violations charged in the complaint had been reserved for the Board's authority "in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." *Pan American*, 371 U.S. at 305, 83 S.Ct. 476. While the Court accordingly ordered the dismissal of all claims against all defendants, the Court was careful to stress the narrowness of its holding; that is, the Federal Aviation Act does not completely displace the antitrust

laws, but only those segments necessarily implicated by the particular regulatory scheme enacted by Congress. The Court held, "While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total." *Id.*

In *Hughes Tool Co., supra*, Trans World Airlines ("TWA") brought an antitrust action against Hughes Tool Company ("Toolco") that challenged Toolco's ability, in exercise of its controlling interest in TWA, to control and dictate how TWA acquired and financed aircraft. Toolco had defended itself claiming that its challenged transactions were under the control and surveillance of the Civil Aeronautics Board ("CAB") and subsequently immune from the antitrust laws by virtue of the Federal Aviation Act of 1958. The district court had entered a default judgment against Toolco, which the Second Circuit Court of Appeals upheld. The Second Circuit had distinguished *Pan American*, concluding that the continuing supervision of the CAB over the Toolco-TWA relationship was general and not related to any specific conduct that would have constituted an antitrust violation. *Hughes Tool Co.*, 409 U.S. at 378, 93 S.Ct. 647. The Supreme Court disagreed and found *Pan American* applicable to the case, especially in consideration of the relevant statute

and the several opinions and orders issued by the CAB regarding the Toolco-TWA relationship.

[F]rom 1944 through 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were “just and reasonable and in the public interest.”

409 U.S. at 379, 93 S.Ct. 647. Toolco was forbidden from acquiring control of TWA without CAB approval; under the Federal Aviation Act, the CAB only could have approved the acquisition if it were found consistent with the public interest, *id.* at 381, 93 S.Ct. 647, and the CAB could not have approved Toolco's actions had there been the possibility of a resultant monopoly which could have restrained competition or jeopardized another air carrier. *Id.* at 384, 93 S.Ct. 647. As in *Pan American*, the Court in *Hughes Tool Co.* emphasized the narrowness of its holding, namely that

while the defendant was entitled to antitrust immunity in this case, the Federal Aviation Act overall does not completely displace the antitrust laws. *Id.* at 389, 93 S.Ct. 647.

According to Defendants, *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir.1976), supports their argument for implied immunity in this case,<sup>19</sup> that Plaintiff's action should be dismissed considering the FAA's participation in the initial drafting of the challenged ICA's and its continued involvement throughout Defendants' revisions thereof. In *Scroggins*, several airlines contractually created a jointly-owned transportation arrangement agency, which was entrusted with such powers as the ability to negotiate contracts with third parties for the pick-up and delivery of air cargo. 534 F.2d at 1126-27. The Civil Aeronautics Act of 1938 required the airlines to submit these contracts for the approval of the CAB. *Id.* at 1127. The Board expressly found that the agreement was not contrary to the public interest, but also announced an intention to

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<sup>19</sup>Regarding Defendants' implied immunity defense, the parties have not cited any Third Circuit precedent, as the Third Circuit has apparently not yet addressed under what circumstances in the aviation context a defendant would be entitled to implied immunity from the federal antitrust laws.

reexamine the arrangement if future circumstances so required. *Id.* Plaintiff was the trustee in bankruptcy for a trucking company which had requested an increase in the rates under its contract with the agency; the agency responded by diverting its business to another trucking company.

The court in *Scroggins* held that the defendant's conduct was immunized from antitrust liability because "(a) the actions complained of were within the contemplation of prior CAB orders which specifically considered effects upon future competition and (b) the CAB has retained an active supervisory jurisdiction to correct anti-competitive developments as they arise." 534 F.2d at 1132. Concerning the involvement of the regulatory agency in the formulation and oversight of the air cargo contracts, the court in *Scroggins* found it persuasive that the CAB continued to subject contractual amendments to scrutiny in order to determine whether the amendments furthered the public interest. The CAB had been exercising continuing jurisdiction over the affected area of operations, and only approved the revised contracts when found not to be adverse to the public. *Id.* at 1131-32. The court wrote, "The CAB has continued to scrutinize every amendment to the contract which defines ACT's rights and duties, and has approved the revise [d] contracts only when found not to be adverse to the public interest.... The Board also

announced that it would reconsider its approval if the future development of ACT should so warrant.” *Id.* at 1132.

### **c. Implied Immunity Does Not Apply in This Case**

The Court concludes as a matter of law that Defendants are not entitled either to express or to implied immunity from antitrust prosecution. Defendants contend that they could not have promulgated their ICAs had the FAA not first participated in the drafting and revision of the language and then later approved the language. Defendants suggest that because they have acted in obedience to a regulatory authority, they are impliedly immune from Plaintiff's subsequent charges that their conduct violated the antitrust laws.

The Court rejects Defendants' contentions for two reasons. First, as noted above, Defendants have overstated the thrust of the FAA regulations. Second, Defendants' argument that those industry actors who adhere to a regulatory agency's regulations are thereafter insulated from antitrust liability is incorrect in its breadth. Even if Defendants' theory were generally correct, Supreme Court precedent firmly establishes that the Federal Aviation Act, which created the regulatory agency at issue in this case, does not

completely displace the antitrust laws. *Pan American*, 371 U.S. at 305, 83 S.Ct. 476; *Hughes Tool Co.*, 409 U.S. at 389, 93 S.Ct. 647. The major theme of those cases is that immunity is implied only where the challenged conduct is subject to a regulatory scheme that expressly directs the agency to consider antitrust policies in the context of the regulated industry. There is no evidence to this effect in this case.

Defendants correctly contend that the overriding federal interest in aviation safety compels them to adhere to the guidelines and requirements of the regulatory body. But compliance with safety regulations does not lead to antitrust immunity from the antitrust laws. Defendants' overstatement is argued in their reply brief,

When companies stray from the mandates and requirements of governmental regulation, people get hurt, people even die. One need go no further than a daily newspaper to recognize [sic] this fact, with commonplace examples such as polluters bypassing regulation by discharging harmful agents into the environment and businesses violating fire codes. So too with the aviation industry.

(Def.' Reply Br. at 9.) While this Court certainly

cannot question the importance of compliance with federal regulations where aviation safety is concerned, the Court notes that Defendants' argument does not support its implied immunity claims. That is, Defendants would have this Court find them impliedly immune from antitrust litigation because the FAA concluded that Defendants' manual-written collaboratively by Defendants and the FAA-would be effective in promoting and guaranteeing hot air balloon safety. The disconnect is obvious.

What Defendants neglect to show, with any evidence, is that the FAA, in collaborating with Defendants, specifically considered the potential alleged anticompetitive consequences of the ICA and nonetheless approved or accepted the language. Defendants have only presented evidence that the primary concern of the FAA was aviation safety, which this Court obviously should not question or second-guess. In a December 1998 letter to Mr. DiGiovanni, submitted to the Court by Defendants, Ava L. Mims of the FAA stated, "*It is not the responsibility of the FAA to monitor antitrust issues, which are a matter for the civil courts.*" (Defs.' Ex. K.) Mark West, President of Aerostar International, Inc., stressed that the Defendants and the FAA were cooperating with aviation safety (and not the anticompetitive consequence) as their chief consideration, stating that:

The overall goal of both Raven and the FAA was to promote aviation safety through language which instructed the aircraft owner as to how and when the aircraft would no longer be airworthy, i.e., when and how repairs were required so that the aircraft could be legally, and safely, flown.

(West Aff. of Nov. 2003 ¶ 7; *see also id.* ¶¶ 4, 8.) Demonstrating further that the Defendants and the FAA were primarily concerned with fostering and ensuring aviation safety, Mr. West also stated, "The language of the ICA was not the product of any effort by defendants to limit or restrict the market, rather, it was a function of Raven and Acrostar's compliance with the Federal laws and the Federal Agency empowered to enforce those laws in the interest of aviation safety." (*Id.* ¶ 11.) That the FAA had not considered the anticompetitive consequences of Defendants' ICA is no surprise, especially upon consideration that nothing in the ICA outright forbids the use of third-party replacement fabric.

However, under *Pan American* and *Hughes Tool Co.*, it is clear that a defendant wishing to invoke implied antitrust immunity must demonstrate that the regulatory agency was authorized by Congress to consider the

anticompetitive implications of its actions and enact regulations that essentially "trumped" the antitrust laws. Under those circumstances, Congress intended the regulatory scheme to operate as a more refined, but functionally equivalent, substitute for the standard antitrust regime, and that to penalize the challenged conduct would be an invasion of the regulatory agency's competence. The Court in *Pan American, supra*, concluded that the plaintiff's complaint should have been dismissed because the relevant statute explicitly gave the regulatory agency broad power to investigate and halt unfair practices and unfair methods of complaint-including those alleged in the complaint-and because if the courts later were to intrude, imposing their own interpretation of the antitrust laws, the two regimes potentially would collide. Similarly in *Hughes Tool Co., supra*, the Court concluded that the defense of implied immunity was applicable because the regulatory agency, pursuant to statutes that empowered it to permit only those acquisitions of control that were not inconsistent with the public interest and that would not have resulted in a monopoly, had considered the anticompetitive consequences of the defendant's every acquisition and lease of aircraft. Along these lines, the court in *Scroggins, supra*, held that the defendant's conduct was immunized from antitrust liability because "(a) the actions complained of were within the contemplation of prior CAB orders which specifically

considered effects upon future competition and (b) the CAB has retained an active supervisory jurisdiction to correct anti-competitive developments as they arise.” 534 F.2d at 1132.

**d. The Evidence in This Case Does Not Show FAA  
—Consideration of Anticompetitive Consequences**

The deposition testimony in evidence shows that the FAA reviewed Defendants' ICAs in order to promote and preserve aviation safety. There is nothing in the record demonstrating that the FAA considered the antitrust laws and weighed the anticompetitive effects, if any, of its approval of Defendants' ICA language. Gregory Michalik is the FAA Senior Aerospace Engineer and Program Manager in charge of FAA oversight for the Aerostar program on behalf of the FAA, and it is on his testimony Defendants rely for their contention that the relationship between Defendants and the FAA is a formal, collaborative process to ensure aviation safety from which Defendants may not deviate. The Court finds that Mr. Michalik's testimony demonstrates the overarching safety concern in drafting the ICAs. When asked whether he knew the purpose of the particular provision

that required approval to replace up to the maximum 65 percent of the hot air balloon envelope, Mr. Michalik testified, "My understanding is to maintain the structural integrity of the envelope and so it would be a safe vehicle to fly." (Michalik Dep., Defs.' Ex. G, at 38; *see also id.* at 42-43.) Mr. Michalik's deposition proceeded as follows in pertinent part:

[Defense Counsel]: What were you conveying to Mr. DiGiovanni in [a letter addressed to him], what were you telling him?

[Mr. Michalik]: It was that if you need to replace more than 35 percent of your fabric that a request should be sent to Aerostar. Aerostar will then evaluate the request, see where the damage is, help them with putting together a repair, and provide them with the necessary instructions and documents in order to complete that repair.

Q: Is the reason for that because that's what the ICA said?

A: Yes.

Q: And on behalf of the FAA you were making it your position that the ICA's instructions were to be followed by the balloon owner, correct?

A: Yes.

Q: What would be the underlying purpose of that instruction?

A: To insure that the repaired balloon would be in a safe condition for flight.

(*Id.* at 55-56.) Mr. Michalik stated that in drafting the ICA language alongside Defendants, the predominant consideration of the parties was aviation safety (*see, e.g., id.* at 46), and nowhere does Mr. Michalik even hint that the FAA contemplated the anticompetitive consequences of its collaboration with Defendants. In addition to Mr. Michalik, Michael Gallagher and William Timberlake-FAA Small Plane Directorate Manager and FAA Manager, respectively-also testified that FAA acceptance of ICA language is a formal, *safety-driven* process undertaken by all manufacturers before they can place their aircraft and parts on the market. (Gallagher Dep., Defs.' Ex. I, at 32; Timberlake Dep., Defs.' Ex. J, at 82-83.)

Defendants have not argued that the FAA considered the anticompetitive ramifications of its approval or acceptance of their ICA language, nor does the evidence of record support this Court independently finding as a matter of law that the FAA had actually contemplated and condoned, as was its administrative prerogative, the effects of its imprimatur on competition within the hot air balloon industry. Instead, in their papers and arguments submitted to the Court, Defendants consistently have contended that the FAA

approved or accepted their manuals in the interest of aviation safety, and not in the interests of promoting competition within the industry. Defendants argued that “[a]t all times, the defendants operated within the strictures of a statutory scheme developed and maintained by the FAA *for the primary purpose of ensuring air safety.*” (Defs.’ Mem. Supp. Mot. Summ. J. at 31) (emphasis added).

As Defendants stated in their reply brief, “each FAA representative has testified that these considerations are grounded in *safety* considerations, the FAA’s primary charge to the public, implemented by regulating manufacturers in the market ....” (Defs.’ Reply Br. at 9) (emphasis added).

The Court cannot conclude as a matter of law that exposing Defendants to antitrust liability stemming from a challenged safety manual written in collaboration with a regulatory agency would interpose a second, potentially adverse construction of the antitrust laws, as proscribed by *Pan American* and *Hughes Tool Co.*, where the regulatory agency at issue is not demonstrated to have authorized (or ever considered) the possible anticompetitive consequences, nor even alleged to have such regulatory power. “Antitrust immunity is not conferred by the bare fact

that defendants' activities might be controlled by an agency having broad powers over their conduct." *Phonetele, Inc. v. AT & T Co.*, 664 F.2d 716, 729 (9th Cir.1981).

The Court concludes that Defendants have not satisfied their burden to succeed on this argument of their motion for summary judgment.

### **C. Third Argument: Whether Plaintiff Has Presented Sufficient Facts to Prove a *Prima Facie* Case**

#### **1. § 2 Monopoly Claim**

##### **a. Parties' Contentions**

Count I of Plaintiff's complaint charges monopolization and attempted monopolization, and alleges that the relevant product market is "the Raven/Aerostar balloon replacement fabric market in the U.S." (Compl.¶ 32.) Defendants argue again, as an alternative to immunity, not only that Plaintiff cannot demonstrate that their conduct was anticompetitive, (because their actions in formulating and maintaining their ICAs were taken while acting pursuant to a regulatory system that obligated them to take the very actions at issue in this

case), but also, that Plaintiff can display nothing other than a highly subjective, personal opinion that the defendants' conduct was anticompetitive. According to Defendants, all the objective evidence-as derived from other parties, from the ICAs and FARs, and from the FAA itself, through the testimony of Mr. Mickalik-indicates that Defendants were acting under the auspices of the FAA and the FARs, and solely in the interest of promulgating air safety for hot air balloonists within the confines of a regulatory system.

Defendants also argue that the evidence of record does not indicate any anticompetitive activity by them. According to Defendants, the evidence reveals that even if they are not immune, the market for replacement fabric is a function of the extreme regulatory measures placed upon any person or entity wishing to participate in the market. As Defendants emphasize, until the mid-1980s, Raven/Aerostar was the only participant in this market and has only since been joined by two other companies able to secure regulatory preapproval. (West Aff. of Nov. 2003 ¶ 13.) Defendants argue that their standing in the market is not a function of anticompetitive activity, but of natural market forces within a highly regulated industry. (*Id.*)

## b. Analysis

Plaintiff acknowledges that Defendants' early prominence in the market largely was due to FAA regulations and prerequisites no other company had satisfied. (Pl.'s Mem. at 32.) Plaintiff argues that after attaining such status, Defendants took full advantage of its monopoly position to discourage any competition by implying through its ICAs, as discussed above, that use of any other company's fabric would render the balloons "unairworthy". Defendants allegedly placed further restrictions upon how much fabric could be replaced without first obtaining its permission to make the repair, and informed all owners and repairmen that these restrictions were "expressly" authorized by law.<sup>20</sup>

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<sup>20</sup>The most notable example of this behavior was the September 7, 2000 letter Defendants mailed to their hot air balloon customers in the wake of the *Braden's Balloons* litigation, in which Defendants wrote, in pertinent part:

We have been in contact with various offices within the FAA and have their full agreement, based on the FAR's and the requirements within the FAA Type Certificate Data Sheet that "all  
(continued...)

The Court requested both parties to submit supplemental briefs on the leading Supreme Court decision on the interplay between the antitrust laws and replacement products, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). In this case, the district court had granted summary judgment for Kodak on allegations that Kodak unlawfully monopolized and attempted to monopolize the sale of service and parts for copy and micro-graphic equipment manufactured by Kodak and had also engaged in an alleged tying arrangement. The plaintiffs were independent service organizations (ISO's) which asserted that Kodak's policies to limit the availability of replacement parts for its equipment to ISO's, and to make it more difficult for ISO's to compete with Kodak in servicing such equipment, violated the antitrust laws. The Ninth Circuit had reversed the summary judgment for Kodak

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<sup>20</sup>(...continued)

inspections, repairs, and replacements must be accomplished in accordance with the latest issue of Aerostar Instructions for Continued Airworthiness.”

(Pl.'s Mem. Opp'n Summ. J. at 15, emphasis removed; see also *supra* p. 198.)

and the Supreme Court affirmed.

The Court will follow the order established by Plaintiff's Complaint and first consider Plaintiff's claims under Section 2. The Supreme Court has defined monopoly as follows:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

*Kodak*, 504 U.S. at 481, 112 S.Ct. 2072 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)).<sup>21</sup>

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<sup>21</sup>Plaintiff also alleges attempted monopolization. In order to prevail on an attempted monopolization claim under the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of  
(continued...)

In *Kodak*, the Supreme Court, in an opinion by Justice Blackmun, rejected Kodak's contention that as a matter of law, there could not be a separate product market for the replacement parts of one manufacturer. In *Kodak*, the Supreme Court held that although there was evidence that there was substantial competition in the sale of copiers, there could be relevant markets confined to the servicing of Kodak copiers (as opposed to servicing of all copiers) and confined to the sale of Kodak's spare parts, because there were facts in the record to support the ISOs' contention that the parts and

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<sup>21</sup>(...continued)

achieving monopoly power. See, e.g., *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 157 (3d Cir.1999). In order to determine whether there exists a dangerous probability of achieving monopoly power, a court must inquire "into the relevant product and geographic market and the defendant's economic power in that market." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 442 (3d Cir.1997) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993)). In light of the Court's disposition of Plaintiff's monopolization claim, the Court need not separately consider the claim of attempted monopolization.

servicing of Kodak copiers were unique. See 504 U.S. at 481-82, 112 S.Ct. 2072.<sup>22</sup>

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<sup>22</sup>There are many cases in which other district courts have found replacement markets limited to the products of a single supplier where they are unique and have no reasonably interchangeable substitutes. See, e.g., *U.S. Anchor Mfg., Inc. v. Rule Indus.*, 7 F.3d 986, 997-98 (11th Cir.1993) (considerably more expensive anchor excluded from broader market of functionally interchangeable but up to 50% less expensive anchors), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2710, 129 L.Ed.2d 837 (1994); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1305-07 (5th Cir.1971) (concluding that single natural gas field constituted relevant market), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); *Hewlett-Packard Co. v. Arch Assocs. Corp.*, 908 F.Supp. 265, 270 (E.D.Pa.1995) (complaint adequately pleaded relevant product market, even where market limited to distribution of Hewlett-Packard computer printers); *Nat'l Communications Ass'n, Inc. v. AT & T Co.*, 808 F.Supp. 1131, 1135 (S.D.N.Y.1992) (denying motion to dismiss because "a monopolist, or person attempting to monopolize, can be found liable in regard to distribution of its own product if it is (1) illegally attempting to destroy competition by refusing to deal or (continued...)

In Plaintiff's submission on *Kodak*, as to the claim of monopolization, Plaintiff asserts that *Kodak* squarely rejects any concept that a defendant with a natural monopoly cannot be guilty of monopolization. However, Plaintiff goes on to argue that the Defendants' marketing strategy was similar to Kodak's and that Defendants used their control over the contents of their air worthiness manuals (the ICAs) to expand their control into the replacement fabric market, and that Defendants, as Kodak, utilized the monopoly they initially enjoyed as a result of having created a new product in order to perpetuate their monopoly improperly and to destroy competition.

Plaintiff also asserts that the testimony of Mr. Waligunda (Pl.'s Ex. F, at 17-19, 23-25) establishes that Defendants intended to utilize its market power to gain a competitive advantage and to destroy a competitor. Plaintiff argues that the *Kodak* decision requires this Court to defer to a jury trial for resolution of Defendants' assertion that their exclusionary practices were necessary to maintain service for sophisticated equipment, and to ensure safety of balloon owners and riders.

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<sup>22</sup>(...continued)

(2) controlling an essential service or bottleneck”).

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No. 05-887

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IN THE  
**Supreme Court of the United States**

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HARRISON AIRE, INC.,

*Petitioner,*

v.

AEROSTAR INTERNATIONAL, INC., *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED FOR REVIEW**

The only question presented by this case, one which is inappropriate for granting Certiorari by this Court, is whether the Third Circuit Court of Appeals properly utilized existing antitrust law and established precedent in affirming the dismissal of plaintiff's antitrust claim upon Petitioner's failure to present a triable issue of fact.

## **PARTIES TO THE PROCEEDING**

### **Harrison Aire, Inc.:**

Plaintiff in the District Court for the Eastern District of Pennsylvania and Appellant in the United States Court of Appeals for the Third Circuit; Petitioner before this Court.

### **Aerostar International, Inc.:**

Defendant in the District Court for the Eastern District of Pennsylvania and Appellant in the United States Court of Appeals for the Third Circuit; Respondent before this Court.

### **Raven Industries, Inc.:**

Defendant in the District Court for the Eastern District of Pennsylvania and Appellant in the United States Court of Appeals for the Third Circuit; Respondent before this Court.

## **CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6**

Aerostar International, Inc. is a wholly owned subsidiary of Raven Industries, Inc.

Raven Industries has no parent corporation, nor does any publicly held company own 10% or more of its stock.

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## INTRODUCTION

Plaintiff-Petitioner Harrison Aire, Inc. ("Harrison Aire") commenced the within litigation with the filing of a complaint ostensibly sounding in antitrust, alleging, *inter alia*, illegal antitrust activities by the defendants within the replacement fabric aftermarket for hot air balloons. More particularly, Harrison Aire was a New Jersey based purveyor of hot air balloon rides, who asserted a claim for damages in the form of business losses due to defendants' alleged monopolization and unlawful tying.

On motion for summary judgment wherein defendants challenged the sufficiency of plaintiffs' evidence, the District Court appropriately considered the facts in the light most favorable to the Petitioner. In thorough and detailed fashion, the District Court granted defendants' motion for summary judgment, finding a dearth of evidence which would bespeak any antitrust violation on the part of the defendants sufficient to raise a triable issue of fact.

Plaintiff appealed the grant of summary judgment to the Third Circuit Court of Appeals. The Third Circuit reiterated the appropriate standard of review, i.e. that in considering the case, all due inferences were afforded to the Petitioner. Upon consideration of the briefs and following oral argument, the Third Circuit Court of Appeals affirmed the District Court's finding that the Petitioner lacked sufficient evidence to create a triable issue of fact. As did the District Court, the Third Circuit provided a studied, detailed analysis of both the facts and applicable antitrust law, and reached the proper conclusion. The Court did not, as Petitioner suggests, stray from precedent or create a heightened burden of proof compelling Supreme Court review.

## STATEMENT OF THE CASE

This matter involves allegations by plaintiff Harrison Aire against defendants Raven Industries, Inc. ("Raven") and Aerostar International, Inc. ("Aerostar"), claiming that defendants committed antitrust violations resulting in business losses to the Petitioner. Defendants successfully challenged the sufficiency of plaintiff's evidence on motion for summary judgment, which decision was affirmed on appeal. The Courts below made their determinations on the following facts.

Petitioner Harrison Aire is a New Jersey company engaged in the business of, *inter alia*, providing commercial balloon rides to its customers. It is owned and operated by its sole proprietor, Terry Harrison ("Harrison.") Commencing in the late 1970's, Harrison Aire purchased hot-air balloons from Raven and Aerostar, and Harrison, a well-qualified mechanic, maintained his fleet himself. In part, Harrison maintained his aircraft by replacing the fabric in the worn top portion of his balloon envelopes, providing added life to the balloon system, a procedure which he undertook several times.

In 1996, Harrison Aire's large ride balloon had reached the end of its life expectancy and required major fabric replacement for the envelope, and Harrison explored his repair options. An experienced mechanic, he well recognized that the Federal Aviation Regulations ("FAR's") provide limited market options for hot-air balloon owners seeking to purchase replacement fabric, as by law, a hot-air balloon envelope can only be repaired with FAA approved parts (fabric is an aircraft "part") from either a) the manufacturer of the product, b) the holder of a Supplemental Type

Certificate (STC), or c) an entity with Parts Manufacturing Approval (PMA). 14 C.F.R. 21.303.

It was undisputed that Harrison's options for fabric repair were not only limited by the FAR's, but by the fact that in 1995, there were only three FAA-qualified purveyors for replacement fabric, Aerostar (the manufacturer), Ron DiGiovanni (doing business as Custom Nine Designs out of New York), and Head Balloons, located in Georgia. Understanding that his options were thus limited, Harrison visited DiGiovanni in late 1995 or early 1996. Harrison had long known that Custom Nine had sold replacement fabric for hot air balloons. Custom Nine attempted to sell him fabric under a PMA which it held, advising Harrison that the Custom Nine had the legal authority to make the sale. Harrison, however, was not convinced that the fabric was of sufficient quality to use, claiming that he relied upon Aerostar's and the FAA's criteria to make this judgment. Despite the fact that the FAR's gave Custom Nine the authority to sell fabric, and despite Custom Nine's express representation to this effect, Harrison rejected the Custom Nine fabric and Custom Nine's (STC) replacement envelope. Harrison also expressed concern over the possibility that Custom Nine would sell "bogus parts." Harrison knew of Head Balloons at that time, but failed to discover that they were STC purveyors of replacement fabric and did not pursue that option. Rather, he did nothing, and his balloon remained in a state of disrepair.

Despite his wealth of industry knowledge relative to his fabric repair options, and despite assurances by Custom Nine, plaintiff claimed through the lawsuit that defendants deceived him into believing he had no options other than to obtain repairs through the defendants. Petitioner averred that

defendants' Instructions for Continued Airworthiness (hereinafter "ICA's")<sup>1</sup> left him without any market options other than the manufacturer. In reality, he neglected or rejected other commercial options and ignored his wealth of FAA knowledge. He did nothing, and years later, through this litigation, alleged that the ICA language was misleading, anticompetitive, and violative of the antitrust laws.

The claims of monopolization, however, were not supported by any market analysis, expert or otherwise, delineating monopoly power, monopolization, market share, or any other activity or circumstance supportive of Petitioner's claim. While Petitioner proffered an expert on damages, there was no palpable relation to antitrust injury. Ostensibly, the plaintiff's case rested on Terry Harrison's highly subjective, questionable, and legally-irrelevant view that he had been misled by defendants' literature. *Frosty Bites, Inc. v. Dippin' Dots, Inc.*, No. 3-01-CV-1532-M, 2003 U.S. Dist. LEXIS 8472, at \*8 (N.D. Tex. May 19, 2003); *McKnight v. School District of Philadelphia*, 171 F.Supp. 2d 446, 448 (E.D. Pa. 2001).

The District Court found several flaws in Petitioners' legal theories. Particularly, the District Court found that the evidence did not display the existence of the requisite market. (Appendix A at 110a). Moreover, the District Court determined that there was insufficient evidence in the record to show that defendants achieved monopoly power by virtue of conduct illegal under Section 2, or that defendants even

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1. Instructions for Continued Airworthiness were FAA mandated in revisions to 14 C.F.R. 21-1, *et seq.* and 14 C.F.R. 31.82 in 1981. This document must be prepared by the manufacturer, accepted for use by the FAA and used by maintainers of aircraft.

possessed monopoly power. (Appendix A at 110a-112a). The Court also found an abundance of evidence that nothing precluded Petitioner from purchasing balloons or replacement parts from other sources, and nothing precluding those entities from entering the market. (Appendix A at 113a-114a).

As to Petitioner's claims of being "fooled" by defendants ICA, the District Court found that "Defendants' ICA did not forbid Harrison Aire from purchasing other manufacturers' fabric and that a reasonable investigation on this point by Harrison would have disclosed, accurately, the relevant regulatory environment and that Plaintiff could buy replacement fabric from anyone who manufactured them to the FAA standards." (Op. at 54). A reasonable investigation, the Court continued, would have revealed market options plainly available to the plaintiff. Summarizing the significant evidence countering plaintiff's theory, the Court noted the interchangeability of defendants' fabric with other FAA approved parts; the existence of other purveyors; and the **complete absence of evidence** indicative of market power or monopolization through illicit means. (Appendix A at 110a-112a). Lacking the ability to establish a *prima facie* case sounding in antitrust, whether through monopolization or tying, the District Court granted defendants' motion for summary judgment.

In affirming, the Third Circuit offered a similarly well-reasoned analysis. In its opinion, the Court delineated the fundamental and applicable precepts of antitrust law, relying heavily upon this Court's seminal decision in *Eastman Kodak Co. v. Image Technical services, Inc.*, 504 U.S. 451 (1992).

Even upon a review of the facts in the light most favorable to the Petitioner, the Third Circuit held that

Harrison Aire has failed to meet its burden of dissociating competition in the primary market from conditions in the aftermarket. It is undisputed that the primary balloon market is competitive. And unlike the plaintiffs in *Kodak*, Harrison Aire has failed to produce evidence of supracompetitive pricing, of dominant aftermarket share, of information costs preventing lifecycle pricing, or of a change in aftermarket policy targeting locked-in customers. Together, these evidentiary failures compel summary judgment for the defendant.

(Appendix A at 20a.). The Circuit Court similarly held that the Petitioner's evidentiary failures extended to Petitioner's allegation of an unlawful tying arrangement. (Appendix A at 23a.).

### **REASONS FOR DENYING THE PETITION**

Contrary to Petitioner's suggestion, the matter did not turn on a heightened standard imposed upon a plaintiff seeking to advance antitrust allegations in cases involving aftermarket products. As is patently evident from both decisions below, the case turned upon the complete dearth of evidence presented by Petitioner to the trial court in furtherance of an antitrust claim. There are thus no viable grounds upon which Petitioner can seek Supreme Court review.

The Circuit Court commenced its analysis by noting that for plaintiff to have survived defendants' motion for summary judgment, it was required to produce economically plausible evidence supporting the elements of its claim. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Kodak*, 504 U.S. 451, 468-69 (1992). Particularly, Petitioner was obligated to display (1) a possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior power, business acumen, or historic accident. *Kodak*, 504 U.S. at 481.

In *Kodak*, This Court delineated the type of evidence which can sustain a plaintiff's burden in an antitrust claim involving aftermarket products. As recognized by both Courts below, this evidence may include supracompetitive pricing, dominant share of the relevant aftermarket, significant information costs that prevented lifecycle pricing by primary market customers, and high "switching costs" which serve to "lock in" aftermarket customers. *Kodak*, 504 U.S. at 469-480.

Petitioner in this matter unduly focuses upon the Circuit Court's terminology in advancing these longstanding tenets of antitrust law, claiming Third Circuit imposition a heightened standard which Petitioner derives from verbiage in the opinion which connotes the need for "hard evidence" or "concrete evidence." (Appendix A at 17a.). The Circuit Court was not, of course, creating a heightened standard, it was describing the specific evidence which *Kodak* outlined as sufficient to withstand a motion for summary judgment, with citation to the *First Circuit's opinion in Systems Maintenance Services, Inc. v. Digital Equipment Corp.*, 188